CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, Notices, and Abstracts

Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 35 NOVEMBER 21, 2001 NO. 47

This issue contains:

U.S. Customs Service

T.D. 01–81 Through 01–83

General Notices

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

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U.S. Customs Service

Treasury Decisions

19 CFR Part 101

(T.D 01–81)

CUSTOMS PRECLEARANCE IN FOREIGN COUNTRIES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations to reflect that Customs has added two new preclearance facilities and to provide that the Customs officer exercising supervisory control over all of the preclearance facilities will be located at Customs Headquarters.

EFFECTIVE DATE: November 8, 2001.

FOR FURTHER INFORMATION CONTACT: Glenn Ross, Office of Field Operations, 202–927–2301.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Customs preclearance operations have been in existence since 1952. There are presently 11 preclearance facilities operating in both Canada and the Caribbean. Each facility is responsible for preclearing U.S. bound passengers and their personal effects and baggage. In most cases, U.S. bound passengers who are precleared in either Canada or the Caribbean are permitted to arrive at a U.S. domestic facility and either directly connect to a U.S. domestic flight or leave the airport. Preclearance facilities primarily serve to facilitate low risk passengers and to relieve passenger congestion at federal inspection facilities in the United States. In fiscal year 2000, 12.5 million passengers were precleared. This figure represents 15% of all commercial air passengers cleared by Customs.

Section 101.5, Customs Regulations (19 CFR 101.5), sets forth a list of Customs preclearance offices in foreign countries and of the Customs officers under whose supervision the preclearance offices function.

The Customs Regulations reflect that there are 9 preclearance offices. This document amends §101.5, Customs Regulations, to add to the list

of preclearance offices one at Orangestad, Aruba and one at Ottawa, Canada. Section 101.5 is also amended to reflect that all preclearance operations are being consolidated under a single Director, Preclearance, located in the Office of Field Operations at Customs Headquarters.

INAPPLICABILITY OF PUBLIC NOTICE AND DELAYED EFFECTIVE DATE REQUIREMENTS

Because this amendment merely reflects the addition of two new Customs preclearance offices and the consolidation of the Customs preclearance operations under a Director, Preclearance, located in the Office of Field Operations at Customs Headquarters, pursuant to 5 U.S.C. 553(b)(B), notice and public procedure are unnecessary, and for the same reason, pursuant to 5 U.S.C. 553(d)(3), a delayed effective date is not required.

REGULATORY FLEXIBILITY ACT AND EXECUTIVE ORDER 12866

Because no notice of proposed rulemaking is required, the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.)* do not apply. This amendment does not meet the criteria for a "significant regulatory action" as specified in Executive Order 12866.

DRAFTING INFORMATION

The principal author of this document was Janet L. Johnson, Regulations Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 101

Customs duties and inspection, Customs ports of entry, Foreign trade statistics, Imports, Organization and functions (Government agencies), Shipments, Vessels.

AMENDMENTS TO THE REGULATIONS

Part 101, Customs Regulations (19 CFR Part 101), is amended as set forth below.

PART 101—GENERAL PROVISIONS

1. The general authority citation for Part 101, Customs Regulations, continues to read, and a new specific authority citation for § 101.5 is added to read, as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 2, 66, 1202 (General Note 22, Harmonized Tariff Schedule of the United States), 1623, 1624, 1646a.

* * * * * * *

Section 101.5 also issued under 19 U.S.C. 1629.

* * * * * * *

2. Section 101.5 is revised to read as follows:

§ 101.5 Customs preclearance offices in foreign countries.

Listed below are the preclearance offices in foreign countries where U.S. Customs officers are located. A Director, Preclearance, located in

the Office of Field Operations at Customs Headquarters, is the responsible Customs officer exercising supervisory control over all preclearance offices.

Country	*Customs Office*
Aruba	Orangestad
The Bahamas	Freeport Nassau
Bermuda	Kindley Field
Canada	Calgary, Alberta Edmonton, Alberta Montreal, Quebec Ottawa, Ontario Toronto, Ontario Vancouver, British Columbia Winnipeg, Manitoba

CHARLES W. WINWOOD,
Acting Commissioner of Customs.

Approved: November 2, 2001.
TIMOTHY E. SKUD,
Acting Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, November 8, 2001 (66 FR 56430)]

(T.D. 01–82)

CANCELLATION OF CUSTOMS BROKER LICENSE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Customs broker license cancellation.

SUMMARY: Pursuant to section 641 of the Tariff Act of 1930, as amended, (19 USC 1641) and the Customs Regulations (19 CFR 111.51), the following Customs broker license is canceled without prejudice.

Name	*License #*	*Port Name*
Davies, Turner & Co.	13590	Philadelphia

Dated: November 6, 2001.

BONNI G. TISCHLER,
Assistant Commissioner,
Office of Field Operations.

[Published in the Federal Register, November 9, 2001 (66 FR 56734)]

(T.D. 01–83)

ANNUAL USER FEE FOR CUSTOMS BROKER PERMIT AND NATIONAL PERMIT; GENERAL NOTICE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of due date for broker user fee.

SUMMARY: This is to advise Customs brokers that for 2002 the annual user fee of $125 that is assessed for each permit held by an individual, partnership, association or corporate broker is due by January 18, 2002. This announcement is being published to comply with the Tax Reform Act of 1986.

DATES: Due date for fee: January 18, 2002.

FOR FURTHER INFORMATION CONTACT: Michael S. Craig, Broker Management (202) 927–0380.

SUPPLEMENTARY INFORMATION: Section 13031 of the Consolidated Omnibus Budget Reconciliation Act of 1985 (Pub.L. 99–272) established that an annual user fee of $125 is to be assessed for each Customs broker permit and National permit held by an individual, partnership, association, or corporation. This fee is set forth in the Customs Regulations in section 111.96 (19 CFR 111.96).

Customs Regulations provides that this fee is payable for each calendar year in each broker district where the broker was issued a permit to do business by the due date which will be published in the Federal Register annually. Broker districts are defined in the General Notice published in the Federal Register, Volume 60, No.187, September 27, 1995.

Section 1893 of the Tax Reform Act of 1986 (Pub.L. 99–514), provides that notices of the date on which a payment is due of the user fee for each broker permit shall be published by the Secretary of Treasury in the Federal Register by no later than 60 days before such due date.

This document notifies brokers that for 2002, the due date for payment of the user fee is January 18, 2002. It is expected that annual user fees for brokers for subsequent years will be due on or about the twentieth of January of each year.

Dated: November 6, 2001.

BONNI G. TISCHLER,
Assistant Commissioner,
Office of Field Operations.

[Published in the Federal Register, November 9, 2001 (66 FR 56734)]

U.S. Customs Service

General Notices

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, November 7, 2001.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

SANDRA L. BELL,
(for Douglas M. Browning, Acting Assistant Commissioner, Office of Regulations and Rulings.

REVOCATION OF RULING LETTER AND TREATMENT RELATING TO GASOLINE & DIESEL FUEL IN A CLASS 9 CUSTOMS BONDED WAREHOUSE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of ruling letter and treatment relating to gasoline & diesel fuel in a class 9 Customs bonded warehouse.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625 (c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking a ruling letter pertaining to gasoline and diesel fuel from a class 9 bonded warehouses and revoking any treatment previously accorded by the Customs Service to substantially identical transactions. Notice of the proposed revocation was published on June 20, 2001, in Volume 35, Number 25, of the CUSTOMS BULLETIN. Two comments were received in response to this notice.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after January 21, 2002.

FOR FURTHER INFORMATION CONTACT: William G. Rosoff, Duty and Refund Branch, (202) 927–2265.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts, which emerge from the law, are **"informed compliance"** and **"shared responsibility."** These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. §1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and to provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, a notice was published on June 20, 2001, in the CUSTOMS BULLETIN, Volume 35, Number 25, proposing to revoke Detroit Port Letter, dated September 5, 2000, pertaining to the use of class 9 Customs bonded warehouses for duty-free fuel. Two Comments were received in reply to the notice.

This notice informs interested parties that Customs intends to revoke a letter issued by the Port Director in Detroit pertaining to the entry into, and sale from, a class 9 Customs bonded warehouse (duty-free store) of gasoline and diesel fuel. Although in this notice Customs is specifically referring to one letter, this notice covers any other letter or ruling relating to the eligibility for entry into, and sale from, a class 9 Customs bonded warehouse which may exist but has not been specifically identified. Two comments were received in response to this notice.

On September 5, 2000, the Port Director, Detroit, issued a letter to Ammex, Inc., granting its request to expand its operation of a class 9 Customs warehouse to include gasoline and diesel fuel tanks to permit, as described by Ammex in a September 1, 2000 letter to Inspector Jim Blaine, the sale of "duty free fuel." The Port Director issued the letter to implement the decision of the Court of International Trade in *Ammex Inc., v. U.S.*, 116 F. Supp.2d 1269 (Ct.. Int'l Trade 2000), which declared HQ 227385 (February 12, 1998) to be contrary to law. In HQ 227385, Customs had reconsidered an earlier ruling, HQ 225287 (June 7, 1994), that concerned gasoline and diesel fuel which had been identified by the party requesting the ruling as duty-free merchandise. Accordingly, in both HQ 227385 and 225287, Customs accepted the requestor's asser-

tion that the merchandise under consideration was duty-free but, for reasons unrelated to its eligibility for duty-free status, determined that such merchandise could not be sold as duty-free merchandise from a class 9 bonded warehouse. The Court of International Trade held that HQ 227385 violated 19 U.S.C. 1557(a)(1), which permits "any merchandise subject to duty, with the exception of perishable articles and explosive substances" to be entered and withdrawn (for exportation) from a bonded warehouse.

The statute governing the operation of duty-free stores, 19 U.S.C. 1555(b)(8)(1), permits operations of duty-free stores to sell and deliver for exportation "duty-free merchandise." That statute defines duty-free merchandise as merchandise on which neither Federal duty nor Federal tax has been assessed pending exportation. 19 U.S.C. 1555(b)(8)(E). Customs regulations implementing 19 U.S.C. 1555(b) provide that "only conditionally duty-free merchandise may be placed on a bonded storage area of a Class 9 warehouse" and define "conditionally duty-free merchandise" as "merchandise sold by a duty-free store on which duties and/or internal revenue taxes (where applicable) have not been paid." 19 CFR 19.35(a) and 19.36(e). In *Ammex, Inc. v. U.S.*, the CIT noted approvingly that there is no conflict between 19 U.S.C. 1557(a)(1) and 19 CFR 19.35(a) and 19.36(e). 116 F. Supp.2d at 1275, n.9.

The Internal Revenue Service has informed the Customs Service that 26 USC 4081 imposes a tax upon entry into the United States of any taxable fuel for consumption, use, or warehousing. Taxable fuel is defined by 26 U.S.C. 4083 to include gasoline and diesel fuel. By IRS regulation, 26 CFR 48.4081–1(a), entry for purposes of 26 U.S.C. 4081 occurs when taxable fuel is brought into the United States and applicable Customs law requires that the taxable fuel be entered for consumption, use, or warehousing. Generally all imported merchandise, which necessarily includes imported gasoline and diesel fuel is required to be entered. Under 19 U.S.C. 1557 the entry of merchandise for warehousing is permitted. Consequently, any fuel subject to a tax when entered for warehousing under 26 U.S.C. 4081 and the implementing Internal Revenue Service regulations cannot qualify as duty-free fuel and, therefore, cannot be entered into a class 9 warehouse pursuant to 19 U.S.C. 1555(b)(1) and the applicable Customs Regulations.

Because only fuel on which neither duty nor tax has been assessed can qualify as duty-free fuel in conformity with 19 U.S.C. 1555(b)(8)(E), the Customs Service intends to revoke the Port Director's letter of September 5, 2000, to the extent that it would allow the sale under 18 U.S.C. 1555(b)(1) of fuel for which a tax was assessed under 26 U.S.C. 4081.

As stated in the proposed notice, this revocation will cover any rulings on this issue which may exist but have not been specifically identified. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the issue subject to this notice, should have advised Customs during the notice period.

Two comments were received—one from Ammex, Inc. and one from Ram Control. The first comment, from Ammex, Inc., made several arguments against the revocation. The commenter asserted that no federal tax has been assessed on gasoline and diesel fuel sold from Ammex's duty-free store and argued that 26 U.S.C. 6103(1)(14) prohibits Customs from accessing such tax information from the IRS. However, IRS has not provided Customs with any information from Ammex's tax returns; it has merely informed Customs that 26 U.S.C. 4081 imposes a tax upon entry of gasoline and diesel fuel. This decision does not determine whether Ammex actually paid the tax. The only determination is that fuel which is assessed a tax under 26 U.S.C. 4081 cannot qualify for entry under 19 U.S.C. 1555(b)(1).

The commenter also argued that Customs cannot make one blanket ruling that includes all importers of gasoline and diesel petroleum that paid taxes based on 26 U.S.C. 4801, but rather that Customs must reply to each individual case as it arises. According to 19 CFR 177.9(b)

> The application of a ruling letter by a Customs Service field office to the transaction to which it is purported to relate is subject to the verification of the facts incorporated in the ruling letter, a comparison of the transaction described therein to the actual transaction, and the satisfaction of any condition on which the ruling was based. If, in the opinion of any Customs Service field office by whom the transaction is under consideration or review, the ruling letter should be modified or revoked, the finding and recommendations of that office will be forwarded to Headquarters Office for consideration, as provided in 177.11(b)(1)(i), prior to any final disposition with respect to the transaction by that office. Otherwise, *if the transaction described in the ruling letter and the actual transaction are the same, and any and all conditions set forth in the ruling letter have been satisfied, the ruling will be applied to the transaction.* (emphasis added).

Therefore, if a person believes that they have a unique situation where all the conditions set forth in the existing ruling letter do not apply, then that person can file for a specific and distinguished ruling from Customs by following the procedure explained in 19 CFR 177.2.

The commenter also makes the argument that the application of 26 U.S.C. 4081 to gasoline and diesel fuel entered into a class 9 warehouse violates the Export Clause of the U.S. Constitution because all merchandise sold by a duty-free store must be exported. Customs disagrees. The Export Clause provides that "No Tax or Duty shall be laid on Articles exported from any State". U.S. Const., art I, 9,cl 5. However, the plain language of 26 U.S.C. 4081 imposes an excise tax on "the entry into the United States of any taxable fuel for consumption, use or warehousing * * *;" not on the export of such taxable fuel and Article I, Section 8, Clause 1 of the Constitution clearly grants Congress the power "lay and collect Taxes, Duties, Imposts and Excises. As noted above, fuel on which a tax is assessed under 26 U.S.C. 4081 does not meet the definition of duty-free merchandise eligible to be entered into a class 9 warehouse;

whether the tax is assessed properly is not an issue for the Customs Service to determine.

The commenter also states that merchandise sold by a duty-free enterprise, by definition and law, is exported. Customs disagrees. The statute provides for different treatment of duty-free merchandise and other than duty-free merchandise. Merchandise that is other than duty-free merchandise is not eligible to be entered into the bonded warehouse itself. That merchandise can only be stored in the retail facility rather than within the bonded warehouse itself. That statutory restriction has been implemented by section 19.36(e) of the Customs Regulations. Since that merchandise was not eligible to be entered for warehousing under 19 USC 1557(a), that statute can't impose an export requirement. On the contrary, merchandise other than duty-free merchandise is required to be kept apart from duty-free merchandise and marked appropriately as duty-paid or US origin goods. There is no requirement imposed by statute, regulation or logic that such merchandise be exported. The provision that other than duty-free merchandise may be delivered to an individual departing from the Customs Territory does not impose any requirement of exportation. The difference in treatment between duty-free merchandise and other merchandise set by statute contradicts the commenter's assertion that all merchandise sold by a duty-free enterprise must be exported. Under 19 U.S.C. 1555(b)(5), duty-free stores may sell "merchandise other than duty-free merchandise, except that such other merchandise may not be stored in a bonded warehouse facility other than a bonded facility used for retail sales." By virtue of 26 U.S.C. 4081 and 19 U.S.C. 1555(b)(8)(E), gasoline and diesel fuel entered under a consumption entry into the U.S. is not duty-free merchandise; it is merchandise other than duty-free merchandise. In fact, merchandise that is subject to any Federal duty or tax could not be merchandise covered by the notice required by 19 U.S.C. 1555(b)(C)(i).

Citing the Court of International Trade's opinion in *Ammex Inc. v. U.S.*, 116F. Supp.2d 1269 (Ct. Int'l Trade 2000), the commenter further contends that the application of 26 U.S.C. 4081 would "nullify" 19 U.S.C. 1555 and 1557 entirely with respect to the entry and sale of gasoline and diesel fuel, thus negating the duty-free and class 9 bonded warehouses themselves. Customs does not agree. The commenter's argument confuses 19 U.S.C. 1557(a)(1) and 19 U.S.C. 1555(b)(1) and (8)(E). Section 1557(a)(1) sets forth the *general* rule applicable to all Customs warehouses that "[a]ny merchandise subject to duty with the exception of perishable articles and explosive substances other than firecrackers, may be entered for warehousing and be deposited in a bonded warehouse * * *" However, as discussed earlier, "1555(b)(1) and (8)(E) impose special requirements for the operation of class 9 warehouses, namely that only merchandise "on which neither Federal duty nor Federal tax has been assessed pending exportation from the customs territory" may be placed in class 9 warehouses. Moreover, contrary to the commenter's assertion, the Court of International Trade has specifical-

ly found that Customs regulations implementing 19 U.S.C." 1555(b)(1) and (8)(E), 19 CFR" 19.35(a) and 19.36(e), are completely consistent with the general rule contained in 19 U.S.C. 1557(a)(1). *Ammex Inc. v. U.S.*, 116F. Supp.2d at 1275, n.9. Consequently, nothing prevents gasoline and diesel fuel from being entered into a Customs warehouse; they simply cannot be placed in a class 9 warehouse and sold as duty-free merchandise. Under 1555(b)(5), operators of duty-free stores are free to sell gasoline and diesel fuel from a bonded facility used for retail sales. Other goods that are not governed by 26 U.S.C. 4081 may still be eligible for "conditionally duty-free merchandise" status.

Finally, this commenter argues that Customs was unclear as to the effective date of revocation. The effective date of the Customs Service's revocation of the Port Director's letter of September 5, 2000 is sixty days after the date of publication of this notice.

The second comment by Ram Control, simply asserts, without analysis or support, that duty-free fuel meets the requirements of sales from duty-free locations and that the U.S. Court of International Trade was correct in their decision to uphold the request of Ammex Detroit to offer such a commodity. Customs has already pointed out that the statute authorizing entry into class 9 Customs bonded warehouses, 19 U.S.C. 1555(b), provides for the entry only of duty-free merchandise. Paragraph (8)(E) of that statute defines duty-free merchandise to mean merchandise sold by a duty-free sales enterprise on which neither Federal duty nor Federal Tax has been assessed. The imported gasoline and diesel fuel at issue was assessed with a tax under 26 U.S.C. 4081, as implemented by 26 CFR 48.4081. Consequently, any fuel that does not meet the statutory definition of duty-free merchandise, is not eligible for entry into a class 9 Customs bonded warehouse. Only fuel on which neither duty nor tax has been assessed can qualify as duty-free fuel in conformity with 19 U.S.C. 1555(b)(8)(E). Because, 26 U.S.C. 4081 imposes a tax upon entry into the United States of any taxable fuel for consumption, use, or warehousing this fuel cannot qualify for duty-free status and cannot be sold as duty free merchandise from class 9 Customs bonded warehouses. It can continue to be sold from a class 9 Customs bonded warehouse as other than duty free merchandise under 19 U.S.C. 1555(b)(5).

Secondly the comment states that the allowance of offering duty-free fuel would help to revitalize the duty-free business and help to increase traffic and tourism dollars for the local communities. This is an issue that is outside of the jurisdiction of Customs that would be more properly addressed by Congress.

Customs, pursuant to 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by Title VI, is revoking the letter of the Port Director, Detroit dated September 5, 2000, that was issued to Ammex and any other ruling not specifically identified, to reflect the proper classification of the merchandise pursuant to the analysis set forth in Head-

quarters Ruling Letter (HQ) 229215. See attachment "A" to this document.

In addition, pursuant to 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by Title VI, Customs is revoking any treatment previously accorded by Customs to substantially identical transaction. This treatment may, among other reasons, have been the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations involving the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule of the United States. Any person involved in substantially identical transactions should have advised Customs during the notice period. An importer's reliance on a treatment of substantially identical transactions or on a specific ruling concerning the merchandise covered by this notice which was not identified in this notice may raise the rebuttable presumption of lack of reasonable care on the part of the importer or its agents for importations subsequent to the effective date of this final decision.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after publication in the CUSTOMS BULLETIN.

Dated: November 1, 2001.

JOHN DURANT,
Director,
Commercial Rulings Division.

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

Category: Drawback Refund

MR. HERBERT C. SHELLEY
STEPTOE & JOHNSON, L.L.P.
1330 Connecticut Avenue, NW
Washington, DC 20036–1795

DEAR MR. SHELLEY:

This is in reference to your comment filed on July 3, 2001 pertaining to the Notice of June 20, 2001 to revoke the letter of the Port Director at Detroit dated September 5, 2000 to Mr. Levesque, President of Ammex Detroit, Duty Free.

Pursuant to section 625 (c), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)), notice of the proposed revocation of the Port Director, Detroit, letter to Ammex, Inc. granting its request to expand its operation of a class 9 Customs warehouse to include gasoline and diesel fuel, was published on June 20, 2001, in Volume 35, Number 25, of the CUSTOMS BULLETIN. Two comments were received in opposition to the proposed revocation. After careful consideration of the comment, as set forth in this notice, we have determined to proceed with the revocation.

The issue under consideration is whether diesel fuel and gasoline for which a Federal Tax has been assessed can qualify as duty-free merchandise for the purposes of entry into

a Class 9 Customs bonded warehouse. Only fuel on that neither duty nor tax has been assessed can qualify as duty-free fuel in conformity with 19 USC 1555(b)(8)(E). This same statute defines duty-free merchandise as merchandise on which neither Federal duty nor Federal tax has been assessed pending exportation. However because, 16 USC 4081 imposes a tax upon entry into the United States of any taxable fuel for consumption, use, or warehousing this fuel cannot qualify for duty-free status and cannot be sold from class 9 Customs bonded warehouses.

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

Category: Drawback Refund

MR. LEE MATTHEWS
RAM CONTROL
P.O. Box 3
Champlain, NY 12919

DEAR MR. MATTHEWS:

This is in reference to your comment filed on July 3, 2001 pertaining to the Notice of June 20, 2001 to revoke the letter of the Port Director at Detroit dated September 5, 2000 to Mr. Levesque, President of Ammex Detroit, Duty Free.

Pursuant to section 625 (c), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)), notice of the proposed revocation of the Port Director, Detroit, letter to Ammex, Inc. granting its request to expand its operation of a class 9 Customs warehouse to include gasoline and diesel fuel, was published on June 20, 2001, in Volume 35, Number 25, of the CUSTOMS BULLETIN. Two comments were received in opposition to the proposed revocation. After careful consideration of the comment, as set forth in this notice, we have determined to proceed with the revocation.

The issue under consideration is whether diesel fuel and gasoline for which a Federal Tax has been assessed can qualify as duty-free merchandise for the purposes of entry into a Class 9 Customs bonded warehouse. Only fuel on that neither duty nor tax has been assessed can qualify as duty-free fuel in conformity with 19 USC 1555(b)(8)(E). This same statute defines duty-free merchandise as merchandise on which neither Federal duty nor Federal tax has been assessed pending exportation. However because, 16 USC 4081 imposes a tax upon entry into the United States of any taxable fuel for consumption, use, or warehousing this fuel cannot qualify for duty-free status and cannot be sold from class 9 Customs bonded warehouses.

JOHN DURANT,
Director,
Commercial Rulings Division.

REVOCATION AND MODIFICATION OF RULING LETTERS AND REVOCATION OF TREATMENT RELATING TO TARIFF CLASSIFICATION OF KEY CHAINS WITH ATTACHED PLASTIC DOLLS OR TOYS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation and modification of a ruling letters and revocation of treatment relating to tariff classification of key chains with attached plastic dolls or toys.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930, as amended, (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking one ruling letter and modifying another pertaining to the tariff classification of key chains with attached plastic dolls or toys under the Harmonized Tariff Schedule of the United States ("HTSUS"). Similarly, Customs also is revoking any treatment previously accorded by Customs to substantially identical transactions. Notice of the proposed revocation and modification was published on September 19, 2001, in Vol. 35, No. 38, of the CUSTOMS BULLETIN. Two comments were received in response to the notice of proposed action. One comment is addressed herein, and the other is addressed in the attached rulings HQ 965101 and HQ 965102.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after January 21, 2002.

FOR FURTHER INFORMATION CONTACT: Deborah Stern, General Classification Branch (202) 927–1968.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **"informed compliance"** and **"shared responsibility."** These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as

amended (19 U.S.C. 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to pursuant to section 625(c)(1), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)(1)), a notice was published in the CUSTOMS BULLETIN, Volume 35, Number 38, on September 19, 2001, proposing to revoke NY 817268, dated December 29, 1995, and to modify NY A83438, dated June 5, 1996, in which certain key chains with attached plastic dolls and toys were classified in Chapter 95, HTSUS. The only two comments received opposed the proposed action. One commentor requested no action be taken by Customs pending the disposition of litigation on a substantially similar issue. The action taken here is merely conforming to the longstanding position Customs has maintained on this issue, and will be reviewed following the outcome of the litigation. The second commentor presented arguments in support of the Chapter 95 classification. Customs response to these arguments is set forth in the attached rulings.

As stated in the proposed notice, this revocation and modification will cover any ruling on this merchandise that may exist but has not been specifically identified. Any party who has received an interpretative ruling or decision (i.e., ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice, should have advised Customs during the comment period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)(2)), Customs is revoking any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, to the importer's or Customs' previous interpretation of the Harmonized Tariff Schedule of the United States. Any person involved in substantially identical transactions should have advised Customs during this notice period. An importer's failure to advise Customs of substantially identical transactions or of a specific ruling not identified in this notice may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of this final decision.

Pursuant to 19 U.S.C. 1625(c)(1), Customs is revoking NY 817268 pursuant to the analysis set forth in HQ 965102 (Attachment A), and is modifying NY A83438 pursuant to HQ 965101 (Attachment B) to reflect the proper classification of certain key chains with attached dolls or toys that lack significant manipulative play value in subheading 7326.20.0050, HTSUS, as: "Other articles of iron or steel * * *: * * * Articles of iron or steel wire: * * * Other. Additionally, pursuant to 19 U.S.C.

1625(c)(2), Customs is revoking any treatment previously accorded by the Customs Service to substantially identical merchandise.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after publication in the CUSTOMS BULLETIN.

Dated: November 5, 2001.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, November 5, 2001.

CLA–2 :RR:CR:GC DBS
Category: Classification
Tariff No: 7326.20.0050

MR. STEPHEN B. KEENEY
CAP TOYS, INC.
26201 Richmond Road
Bedford Heights, OH 44146–1439

Re: NY Ruling 817268 revoked; Key chains with attached doll and toy musical instrument.

DEAR MR. KEENEY:

This letter is to inform you that Customs has reconsidered New York Ruling Letter (NY) 817268, issued to you on December 29, 1995, concerning the tariff classification of the "Micro Size Stretch Armstrong Key Chain" and the "Micro Jammers Key Chain" under the Harmonized Tariff Schedule of the United States (HTSUS). Customs ruled that the subject key chains were classified under subheadings 9502.10.0020, the provision for "dolls representing only human beings and parts and accessories thereof: whether or not dressed: other: not over 33 cm in height;" and 9503.50.0020, the provision for "toy musical instruments and apparatus," respectively. We have reviewed this ruling and determined that these classifications are incorrect. For the reasons that follow, this ruling revokes NY 817268.

Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North America Free Trade Agreement Implementation Act, Pub. L. 103–182, 107, Stat. 2057, 2186 (1993), notice of the proposed revocation of NY 817268 was published on September 19, 2001, in the CUSTOMS BULLETIN, Volume 35, Number 38. Two comments were received. The essence of the arguments opposing the proposal and Customs response are included in the LAW AND ANALYSIS portion of this ruling.

Facts:

According to NY 817268, a "Micro Size Stretch Armstrong Key Chain" consists of a human figure measuring approximately 4 inches in height with permanently attached key chain. The figure has painted facial features and wears a textile top and shorts. The "Micro Jammers Key Chain" comes in an assortment of three styles which include a miniature acoustic guitar, electric guitar and a boom box. The miniature articles are made of plastic and contain a non-replaceable battery which operates a sound reproducing device. Pressing any one of four buttons located on the toy will activate the prerecorded musical sounds. Both products are imported packaged, individually, on a blister card for retail sale.

We note that subheading 9502.10.0020, HTSUS, is now renumbered as subheading 9502.10.0060, HTSUS, and reworded to provide for "dolls representing only human beings and parts and accessories thereof: dolls, whether or not dressed: other." Subheading 9503.50.0020, HTSUS, is now renumbered as subheading 9503.50.00, HTSUS, and reworded to provide for "toy musical instruments and apparatus and parts and accessories thereof."

Issue:

Whether the key chains should be classified under headings 9502 and 9503, HTSUS, as dolls and toys respectively, or under heading 7326, HTSUS, as other articles of iron or steel.

Law and Analysis:

Classification under the HTSUS is made in accordance with the General Rules of Interpretation (GRIs). The systematic detail of the Harmonized System is such that virtually all goods are classified by application of GRI 1, that is, according to the terms of the headings and any relative Section or Chapter Notes. In the event that goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied.

In understanding the language of the HTSUS, the Harmonized Commodity Description and Coding System Explanatory Notes (ENs) may be utilized. The ENs, though not dispositive or legally binding, provide commentary on the scope of each heading of the HTSUS, and are the official interpretation of the Harmonized System at the international level. Customs believes the ENs should always be consulted. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The HTSUS provisions under consideration are as follows:

7326	Other articles of iron or steel:
7326.20.00	Articles of iron or steel wire
7326.20.50	Other
* * * * * * *	
9502	Dolls representing only human beings and parts and accessories thereof:
9502.10	Dolls, whether or not dressed
9502.10.0060	Other
* * * * * * *	
9503	Other toys; reduced-size ("scale") models and similar recreational models, working or not; puzzles of all kinds; parts and accessories thereof:
9503.50.0000	Toy musical instruments and apparatus and parts and accessories thereof

The term "doll" is not defined in the HTSUS. However, EN 95.02 states, in pertinent part, as follows:

> The heading includes not only dolls designed for the amusement of children, but also dolls for **decorative purposes** (e.g., boudoir dolls, mascot dolls), or for use in Punch and Judy or marionette shows, or those of a caricature type.
>
> Dolls are usually made of rubber, plastics, textile materials, wax, ceramics, wood, paperboard, papier maché or combinations of these materials. They may be jointed and contain mechanisms which permit limb, head or eye movements as well as reproductions of the human voice, etc. They may also be dressed. (Emphasis added).

The term "toy" is also not defined in the HTSUS. However, the General EN for Chapter 95 states, in pertinent part, that the "Chapter covers toys of all kinds whether designed for the amusement of children or adults." Further, EN 95.03(A) provides in pertinent part: "Certain toys (e.g., electric irons, sewing machines, musical instruments, etc.) may be capable of limited "use"; but they are generally distinguishable by their size and limited capacity * * *."

GRI 1 provides that articles are to be classified by the terms of the headings and relative Section and Chapter Notes. For an article to be classified in a particular heading, the heading must describe the article, and not be excluded therefrom by any legal note.

The subject articles are novelty items consisting partly of a plastic doll described under heading 9502, HTSUS, and miniature music instruments under heading 9503, HTSUS,

and partly of a steel split ring key chain under heading 7326, HTSUS. As such, the items are not specifically provided for in any one heading. Thus, for tariff purposes, they constitute goods consisting of two or more substances or materials. Accordingly, they may not be classified solely on the basis of GRI 1. Further, GRI 2(a) is inapplicable because it applies to incomplete or unfinished articles, and the key chains are imported in a finished complete condition. GRI 2(b) states that the classification of goods consisting of more than one material or substance shall be according to the principles of GRI 3.

GRI 3(a) states that when, by application of rule 2(b) or for any other reason, goods are, *prima facie*, classifiable under two or more headings, the heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods. As the subject key chains are a composite good, we must apply rule 3(b), which provides that composite goods are to be classified according to the component that gives the good its essential character. We must determine whether the plastic figurines or the steel key ring imparts the essential character to these articles.

EN VIII to GRI 3(b) explains that "[t]he factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of the constituent material in relation to the use of the goods." Recent court decisions on the essential character for 3(b) purposes have looked primarily to the role of the constituent material in relation to the use of the goods. *See Better Home Plastics Corp. v. U.S.*, 915 F. Supp. 1265 (CIT 1996), *aff'd 119* F. 3d 969 (Fed. Cir. 1997); *Mita Copystar America, Inc. v. U.S.*, 966 F.Supp. 1245 (CIT 1997), *rehear'g denied*, 994 F. Supp. 393 (1998); *Vista Int'l Packing Co. v. U.S.*, 890 F. Supp. 1095 (CIT 1995). *See also Pillowtex Corp. v. U.S.*, 893 F. Supp. 188 (CIT 1997), *aff'd* 171 F. 3d 1370 (CAFC 1999).

Moreover, we have consistently held that where a composite good contains both functional and non-functional components, the functional component gives the item its essential character. *See* HQ 087831, dated November 27, 1990 (holding that under a GRI 3(b) analysis, the essential character of a split key ring with a non-utilitarian vinyl attachment was the steel element); HQ 950636, dated September 16, 1992 (following HQ 087831 to conclude that the essential character of a key ring with a plastic ornament in which a logo or photo could be placed was the steel element, and revoking numerous rulings that did not follow that analysis); HQ 960118, dated January 28, 1999 (holding that the key ring imparted the essential character because of its function, as opposed to the voice synthesizer that merely played prerecorded sounds). *See also* HQ 959473, dated April 8, 1997 (holding that flashlight on key ring is not subordinate to the key ring, as a toy would be, for purposes of determining essential character). In HQ 087831, we stated, in pertinent part, that "the steel component is what makes up the utilitarian portion of the key ring, whereas the plastic component is present primarily for decorative purposes." Hence, as a general rule, the steel component is the essential character, and this type of composite good is classified under heading 7326.

A commentor opposed the proposed revocation of NY 817268 and modification of NY A83438, contending that Customs should take no action pending the outcome of litigation on substantially similar articles. The action taken here is merely conforming to the long-standing position Customs has maintained on this issue, as shown in the paragraph above, and will be reviewed on the outcome of the litigation. Another commentor stated that essential character should be determined by the value of the constituent parts and by "purchase decision." Customs believes, as discussed above, that the functional component of a composite good usually imparts the essential character of that good.

However, Customs recognizes that where the doll or toy component has a significant amount of manipulative play value, the doll or toy imparts the essential character of the subject goods. *See* NY B85825, dated May 30, 1997. For example, in NY B85825, the toy component of a "Mr. Potato Head Key Ring" gave the good its essential character because the toy comes complete with attachable features, e.g. eyes, noses and ears, that are stored in the back of its head and can be repeatedly rearranged. The other key chains classified in that ruling had similar levels of manipulative play, justifying their classification in Chapter 95.

Here, the plastic ornament of the "Micro Size Stretch Armstrong Key Chain" is a human figure with painted facial features. Thus, it is a doll representing only human beings that is classifiable under heading 9502, HTSUS. The steel key chain component is classified as other articles of iron or steel under heading 7326, HTSUS. According to the GRI 3(b) analysis enunciated above, the functional component imparts the essential character. The steel key chain performs the function of holding keys, whereas the doll is present for decorative purposes and to add bulk to the entity. As such, it does not have any manipulative play value. Therefore, the essential character is the steel component.

The "Micro Jammers Key Chains" are comprised of plastic miniature musical instruments (acoustic and electric guitars and a boom box) containing sound devices that play prerecorded tunes. Accordingly, it is a toy musical instrument, provided for specifically in subheading 9503.50 and thus would be classified as such. Here, too, the steel key chain component is classified under heading 7326, HTSUS. As stated above, the ENs for heading 9503, HTSUS, distinguishes toy musical instruments from other toys by their limited capacity. The toys here play prerecorded sounds. They cannot be changed by the user. Therefore, they are not functional and have no manipulative play value. Moreover, we have previously held that a key chain with attached voice synthesizer with prerecorded sounds, which is substantially similar to the subjects at issue, is subordinate to the functional key chain component for purposes of essential character. *See* HQ 960118, *supra* at 4. Thus, the essential character is the steel key chain component.

We conclude that NY 817268 was in error because the function over form and significant manipulative play analyses were not applied to determine the essential character of the goods. The essential character of a key chain with a plastic doll or toy musical instrument attached is the key chain. These key chains are accordingly classifiable in subheading 7326.20.0050, HTSUS.

Holding:

The "Micro Size Stretch Armstrong Key Chain" and the "Micro Jammers Key Chain" are classifiable in subheading 7326.20.0050, HTSUS, which provides for: "other articles of iron or steel, articles of iron or steel wire, other."

Effect on Other Rulings:

NY 817268, dated December 29, 1995, is revoked. In accordance with 19 U.S.C. 1625(c) this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, November 5, 2001.

CLA–2 :RR:CR:GC DBS
Category: Classification
Tariff No: 7326.20.0050

MS. ANNETTE MCCORMACK
MEIJER, INC.
2929 Walker Avenue, N.W.
Grand Rapids, MI 49544–9428

Re: NY Ruling A83438 modified; Key chains with attached doll and toy musical instrument.

DEAR MS. MCCORMACK:

This letter is to inform you that Customs has reconsidered New York Ruling (NY) A83438, issued to you on June 5, 1996, concerning the tariff classification of the "Barbie" key chain and the "Etch-A-Sketch" key chain under the Harmonized Tariff Schedule of

the United States (HTSUS). Customs ruled that the subject key chain was classified under subheading 9503.90.0030, HTSUS, the provision for other toys (except models) not having a spring mechanism. We have reviewed this ruling and determined that the classification of the "Etch-A-Sketch" key chain is incorrect. For the reasons that follow, this ruling modifies NY A83438. The instant ruling has no effect on the classification of the "Barbie" key chain that was also classified in NY A83438.

Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North America Free Trade Agreement Implementation Act, Pub. L. 103–182, 107, Stat. 2057, 2186 (1993), notice of the proposed modification of NY A83438 was published on September 19, 2001, in the CUSTOMS BULLETIN, Volume 35, Number 38. Two comments were received. The essence of the arguments opposing the proposal and Customs response are included in the LAW AND ANALYSIS portion of this ruling.

Facts:

The sample "Etch-A-Sketch" key chain classified in NY A83438 consists of a miniature-sized working "Etch-A-Sketch" and attached steel key chain with a steel key ring (*hereinafter* "steel key chain"). The turning of two knobs on the "Etch-A-Sketch" creates a picture, in outline form, on the screen. In order to erase the picture and begin again one must shake the article to clear the screen.

We note that subheading 9503.90.0030, HTSUS, is now renumbered as subheading 9503.90.0080, HTSUS, and reworded to provide for "Other toys; reduced-size ("scale") models and similar recreational models, working or not; puzzles of all kinds; parts and accessories thereof: other: other."

Issue:

Whether the key chain should be classified under heading 9503, HTSUS, as a toy, or under heading 7326, HTSUS, as other articles of iron or steel.

Law and Analysis:

Classification under the HTSUS is made in accordance with the General Rules of Interpretation (GRIs). The systematic detail of the Harmonized System is such that virtually all goods are classified by application of GRI 1, that is, according to the terms of the headings and any relative Section or Chapter Notes. In the event that goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied.

In understanding the language of the HTSUS, the Harmonized Commodity Description and Coding System Explanatory Notes (ENs) may be utilized. ENs, though not dispositive or legally binding, provide commentary on the scope of each heading of the HTSUS, and are the official interpretation of the Harmonized System at the international level. Customs believes the ENs should always be consulted. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The HTSUS provisions under consideration are as follows:

7326	Other articles of iron or steel:
7326.20.00	Articles of iron or steel wire
7326.20.0050	Other
* * * * * * *	
9503	Other toys; reduced-size ("scale") models and similar recreational models, working or not; puzzles of all kinds; parts and accessories thereof:
9503.90	Other
9503.90.0080	Other

The term "toy" is also not defined in the HTSUS. However, the general EN for Chapter 95 states that the "Chapter covers toys of all kinds whether designed for the amusement of children or adults."

GRI 1 provides that articles are to be classified by the terms of the headings and relative Section and Chapter Notes. For an article to be classified in a particular heading, the heading must describe the article, and not be excluded therefrom by any legal note.

The subject articles are novelty items consisting partly of a toy under heading 9503, HTSUS, and partly of a steel split ring key chain under heading 7326, HTSUS. As such, the items are not specifically provided for in any one heading. Thus, for tariff purposes,

they constitute goods consisting of two or more substances or materials. Accordingly, they may not be classified solely on the basis of GRI 1. Further, GRI 2(a) is inapplicable because it applies to incomplete or unfinished articles, and the key chains are imported in a finished complete condition. GRI 2(b) states that the classification of goods consisting of more than one material or substance shall be according to the principles of GRI 3.

GRI 3(a) states that when, by application of rule 2(b) or for any other reason, goods are, *prima facie*, classifiable under two or more headings, the heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods. As the subject key chains are a composite good, we must apply rule 3(b), which provides that composite goods are to be classified according to the component that gives the good its essential character. We must determine whether the toy or the steel key chain imparts the essential character to these articles.

EN VIII to GRI 3(b) explains that "[t]he factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of the constituent material in relation to the use of the goods." Recent court decisions on the essential character for 3(b) purposes have looked primarily to the role of the constituent material in relation to the use of the goods. *See Better Home Plastics Corp. v. U.S.*, 915 F. Supp. 1265 (CIT 1996), *aff'd 119* F. 3d 969 (Fed. Cir. 1997); *Mita Copystar America, Inc. v. U.S.*, 966 FSupp. 1245 (CIT 1997), *rehear'g denied*, 994 F. Supp. 393 (1998); *Vista Int'l Packing Co. v. U.S.*, 890 F. Supp. 1095 (CIT 1995). *See also Pillowtex Corp. v. U.S.*, 893 F. Supp. 188 (CIT 1997), *aff'd* 171 F. 3d 1370 (CAFC 1999).

Moreover, we have consistently held that where a composite good contains both functional and non-functional components, the functional component gives the item its essential character. *See* HQ 087831, dated November 27, 1990 (holding that under a GRI 3(b) analysis, the essential character of a split key ring with a non-utilitarian vinyl attachment was the steel element); HQ 950636, dated September 16, 1992 (following HQ 087831 to conclude that the essential character of a key ring with a plastic ornament in which a logo or photo could be placed was the steel element, and revoking numerous rulings that did not follow that analysis); HQ 960118, dated January 28, 1999 (holding that the key ring imparted the essential character because of its function, as opposed to the voice synthesizer that merely played prerecorded sounds). *See also* HQ 959473, dated April 8, 1997 (holding that flashlight on key ring is not subordinate to the key ring, as a toy would be, for purposes of determining essential character). In HQ 087831, we stated, in pertinent part, that "the steel component is what makes up the utilitarian portion of the key ring, whereas the plastic component is present primarily for decorative purposes." Hence, as a general rule, the steel component is the essential character, and this type of composite good is classified under heading 7326.

A commentor opposed the proposed revocation of NY 817268 and modification of NY A83438, contending that Customs should take no action pending the outcome of litigation on substantially similar articles. The action taken here is merely conforming to the long-standing position Customs has maintained on this issue, as shown in the paragraph above, and will be reviewed on the outcome of the litigation. Another commentor stated that essential character should be determined by the value of the constituent parts and by "purchase decision." Customs believes as discussed above, that the functional component of a composite good usually imparts the essential character of that good.

However, Customs recognizes that where the doll or toy component has a significant amount of manipulative play value, the doll or toy imparts the essential character of the subject goods. *See* NY B85825, dated May 30, 1997. For example, in NY B85825, the toy component of a "Mr. Potato Head Key Ring" gave the good its essential character because the toy comes complete with attachable features, e.g. eyes, noses and ears, that are stored in the back of its head and can be repeatedly rearranged. The other key chains classified in that ruling had similar levels of manipulative play, constituting their classification in Chapter 95.

Here, the "Etch-A-Sketch" component is a miniature version of the "Etch-A-Sketch" drawing toy. As such, it would be classifiable under the residual subheading 9503.90, HTSUS, which provides for all other toys not previously enumerated. The steel chain and

key ring component is commonly classified as other articles of iron or steel under heading 7326, HTSUS. According to the GRI 3(b) analysis enunciated above, the functional component imparts the essential character. The steel key chain performs the function of holding keys. However, the toy has function, as well, because it has manipulative play value. One can turn the knobs to create a picture in outline form, then shake to erase the picture.

Although this process may be done repeatedly, it does not possess the level of manipulative play as the key chains classified in NY B85825, *supra* at 4, or of the "Barbie" key chain classified in the ruling at issue, NY A83438. The key chains whose essential character is that of a doll or toy due to significant manipulative play value comes with various pieces that can be repeatedly rearranged. Moreover, the toys possess a level of manipulative play more comparable to their full-size counterparts. Not only is the "Etch-A-Sketch a single unit, but the mobility of the miniature "Etch-A-Sketch" knobs is far more limited than a full-size "Etch-A-Sketch." It has only a limited level of manipulative play, not the significant amount required to define the essential character. Thus, the essential character is that of a key chain and not of an "Etch-A-Sketch" toy.

We conclude that NY A83438 was in error because the function over form and significant manipulative play analyses were not applied to determine the essential character. The essential character of a key chain with an "Etch-A-Sketch" toy attached is the key chain. It is accordingly classifiable in subheading 7326.20.0050, HTSUS.

Holding:

The "Etch-A-Sketch" key chain is classifiable in subheading 7326.20.0050, HTSUS, which provides for: "other articles of iron or steel, articles of iron or steel wire, other."

Effect on Other Rulings:

NY A83438, dated June 5, 1996, is hereby modified with respect to the classification of the "Etch-A-Sketch" key chain as set forth herein. In accordance with 19 U.S.C. 1625(c) this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

PROPOSED REVOCATION OF RULING LETTER AND TREATMENT RELATING TO TARIFF CLASSIFICATION OF THE PALM VII™ AND PALM VIIx™ HANDHELD ELECTRONIC DEVICES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation of ruling letter and treatment relating to tariff classification of the Palm VII™ and Palm VIIx™ handheld electronic devices.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub.L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling letter pertaining to the tariff classification of the Palm VII™ and Palm VIIx™ handheld electronic devices under the Harmonized Tariff Schedule of the United States ("HTSUS"). Similarly, Customs proposes to revoke any treatment previously accorded by Customs to substantially identical transactions. Comments are invited on the correctness of the proposed action.

DATE: Comments must be received on or before December 21, 2001.

ADDRESS: Written comments are to be addressed to the U.S. Customs Service, Office of Regulations & Rulings. Attention: Regulations Branch, 1300 Pennsylvania Avenue N.W., Washington, D.C. 20229. Comments submitted may be inspected at the same address during regular business hours.

FOR FURTHER INFORMATION CONTACT: Tom Peter Beris, General Classification Branch, (202) 927–1726.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **"informed compliance"** and **"shared responsibility."** These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, this notice advises interested parties that Customs intends to revoke New York Ruling Letter (NY) F89667 pertaining to the tariff classification of the Palm VII™ and Palm VIIx™. Although in this notice Customs is specifically referring to one ruling, NY F89667, this notice covers any rulings on this merchandise which may exist but have not been specifically identified. Customs has undertaken reasonable efforts to search existing data bases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice should advise Customs during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)(2)), Customs intends to revoke any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the

importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule of the United States. Any person involved in substantially identical transactions should advise Customs during this notice period. An importer's failure to advise Customs of substantially identical transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to this notice.

In NY F89667, dated August 10, 2000, set forth as Attachment A to this document, Customs classified the Palm VII™ and Palm VIIx™ handheld electronic devices under subheading 8470.10.0060, HTSUS, which provides for "* * * pocket-size data recording, reproducing and displaying machines with calculating functions * * * [o]ther."

It is now Customs position that the Palm VII™ and Palm VIIx™ are properly classifiable under subheading 8471.30.0000, HTSUS, which provides for "[a]utomatic data processing machines * * * portable digital automatic data processing machines, weighing not more than 10 kg, consisting of at least a central processing unit, a keyboard and a display * * *."

Pursuant to 19 U.S.C. 1625(c)(1), Customs intends to revoke NY F89667 and any other ruling not specifically identified in order to reflect the proper classification of the merchandise pursuant to the analysis set forth in proposed HQ 964880 (*see* "Attachment B" to this document). Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs intends to revoke any treatment previously accorded by the Customs Service to substantially identical transactions. Before taking this action, we will give consideration to any written comments timely received.

Dated: November 6, 2001.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, August 10, 2000.

CLA–2–84:RR:NC:MM: 110 F89667
Category: Classification
Tariff No. 8470.10.0060,
8524.39.4000, and 8524.99.4000

MS. JENNIFER F. KESSINGER
KATTEN, MUCHIN AND ZAVIS
525 West Monroe Street, Suite l600
Chicago, IL 60661–3693

Re: The tariff classification of the Palm VII™ and Palm VIIx™ from Mexico, Ireland, Malaysia, and various other countries.

DEAR MS. KESSINGER:

In your letter dated July 10, 2000, on behalf of your client Palm, Inc., you requested a tariff classification ruling.

The merchandise under consideration is the Palm VII and the Palm VIIx electronic handheld devices. Literature and a sample were submitted. The Palm VII and VIIx both measure 5.25 inches in height by 3.25 inches in width by .75 inches deep. The Palm VII and VIIx employ the Palm Operating System version 3.2 0 ("Palm OS®") which allows the devices to function as electronic organizers. These Palm models also include a built-in two-way wireless radio with integrated antenna. They allow integrated wireless data access to the Internet without use of accessories. It is noted that the radio function is limited to Internet access and not employed in the basic organizer function. The Palm VII and VIIx organizer applications feature a date book, address book, memo pad. to do list, desktop e-Mail connectivity, expense tracking, calculator, HotSync®, software (allowing local and remote synchronization with a user's desktop computer); iMessenger™ application, Web clipping applications, and Internet-ready connectivity (with TCP/IP software to support Intenet-based applications). The Palm VII and VIIx come with desktop organizer software (for installation on a desktop computer) which features a date book, address book, to do list, memo pad, expense report templates, drag and drop links to Microsoft Excel and Word programs, desktop import and export formats, TAB delimited, TXT, and desktop eMail connectivity. As per the handbook included with the sample, the software may be on a CD-ROM or diskettes. The only difference between the Palm VII and VIIx is the amount of storage capacity. The Palm VII features 2 MB while the Palm VIIx features 8 MB.

Although the Palm VII and VIIx may be imported separately, the devices are sold at retail as a set which includes: a Palm VII or VIIx handheld electronic device, a HotSync® cradle Palm™ Desktop organizer software, handbook, getting started guide, batteries, DB–25 adapter and a protective carrying case. In some instances, the Palm VII and VIIx may be imported as a set with the components listed above

The Palm VII and VIIx are pocket-size organizers combined with a two-way wireless radio. As such they are composite machines under Section XVI, Note 3. Their principle function is that of the organizer, recording, reproducing and displaying.

The classification of goods put up in sets for retail sale is governed by GRI 3(b). It is the organizer that imparts the essential character of these sets. However, Chapter 85, Note 6 states that, "[r] ecords, tapes and other media of heading 8523 or 8524 remain classified in those headings, whether or not they are entered with the apparatus for which they are intended."

The applicable subheading for the Palm VII™ and Palm VIIx™ when imported separately or as a set will be 8470.10.0060, Harmonized Tariff Schedule of the United States (HTS), which provides for "* * * pocket-size data recording, reproducing and displaying machines with calculating functions * * * [o]ther." The rate of duty will be free.

The applicable subheading for the Palm Desktop organizer software on a CD ROM will be 8524.39.4000, Harmonized Tariff Schedule of the United States (HTS), which provides for "[r]ecords, tapes and other recorded media for sound or other similarly recorded phenomena * * * [d]iscs for laser reading systems: [o]ther: [f]or reproducing representations of instructions, data, sound, and image, recorded in a machine readable binary form, and

capable of being manipulated or providing interactivity to a user, by means of an automatic data processing machine. * * *" The rate of duty will be free.

The applicable subheading for the Palm Desktop organizer software on diskettes will be 8524.99.4000, Harmonized Tariff Schedule of the United States (HTS), which provides for "[r]ecords, tapes and other recorded media for sound or other similarly recorded phenomena * * * [o]ther: [o]ther: [o]ther." The rate of duty will be free.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177)

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Eileen S. Kaplan at 212–637–7019.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR: CR: GC 964880 TPB
Category: Classification
Tariff No. 8471.3000,
8524.39.4000 and 8524.99.4000

DONALD FISCHER
PRICEWATERHOUSECOOPERS
333 Market Street
San Francisco, CA 94105

Re: Palm VII™ and Palm VIIx™ handheld electronic devices; Palm VII™ Series Retail Sets; Revocation of NY F89667.

DEAR MR. FISCHER:

This is in response to your letter dated February 27, 2001, requesting reconsideration of New York Ruling Letter F89667, dated August 10, 2000, which was issued to counsel on behalf of Palm, Inc. ("Palm"), whom you are now representing. NY F89667 dealt with the classification of the Palm VII™ and Palm VIIx™ handheld electronic devices under the Harmonized Tariff Schedule of the United States ("HTSUS"). In F89667, the Palm VII™ and VIIx™ were classified under subheading 8470.10.0060, HTSUS, which provides for pocket-size data recording, reproducing and displaying machines with calculating functions * * * other.

As explained below, we now believe this classification to be incorrect. This ruling sets forth the correct classification.

Facts:

The merchandise under consideration is the Palm VII™ and Palm VIIx™ handheld electronic devices. The Palm VII™ and Palm VIIx™ both measure 5.25 inches (13.34 cm) in height by 3.25 inches (8.26 cm) in width by .75 inches (1.91 cm) deep. The Palm VII™ and Palm VIIx™ employ the Palm Operating System version 3.2.0 ("Palm OS®") that controls the running of programs and the standard applications such as the date book, memo pad and calculator which are stored in saved memory and executed upon command. The Palm VII™ utilizes a Motorola M68EZ328 (16 MHz Microprocessor) central processing unit ("CPU") and comes with 2 MB of installed random access memory ("RAM") and 2 MB of installed read only memory ("ROM"). The Palm VIIx™ uses a Motorola M68VZ328 (24 MHz Microprocessor) CPU and comes equipped with 8 MB of installed RAM and 8 MB of installed ROM.

Both these Palm models include built-in two-way wireless radios with integrated antennas. They allow integrated wireless data access to the Internet without use of accessories.

It is noted that the radio function is limited to Internet access and operates separately from most of the basic program functions. Both Palm models also include a touch sensitive keyboard, handwriting recognition software (Graffiti®) keyboard, an Infrared Port and LCD display screen.

The Palm VII™ and VIIx™ have pre-installed applications that feature a date book, address book, memo pad, to do list, desktop e-mail connectivity, expense tracking, calculator, HotSync® software (allowing local and remote synchronization with a user's desktop computer), iMessenger™ application, Web clipping applications, and Internet-ready connectivity (with TCP/IP software to support Internet based applications). Additionally, the devices contain sufficient memory for the installation of other program functions available for the Palm series devices. The Palm VII™ and VIIx™ come with desktop organizer software (for installation on a desktop computer) which features a date book, address book, to do list, memo pad, expense report templates, TAB delimiter, TXT and desktop e-mail connectivity. As indicated by the handbook included with the sample, the software may be on a CD-ROM or diskettes.

The Palm OS® is an open operating system which has programming tools readily available to any user either directly from Palm™ or other commercial sources that allow a user to create various programs, either directly on the Palm™ device, or on a host computer that can be downloaded to the Palm™, and executed on demand. A variety of software applications are available for the user from multiple sources (i.e., freeware, shareware, commercial sources).

Although the Palm VII™ or VIIx™ may be imported separately, the devices also are imported as a set which includes: a Palm VII™ or VIIx™ handheld electronic device, a HotSync® cradle, Palm Desktop organizer software, handbook, getting started guide, batteries, DB–25 adapter and a protective carrying case.

Issue:

Are the Palm VII™ and VIIx™ handheld electronic devices properly classified under heading 8470, HTSUS, as pocket-size data recording, reproducing and displaying machines with calculating functions; heading 8471, HTSUS, as hand-held computers; or under heading 8525, HTSUS, as transmission apparatus?

Law and Analysis:

Classification under the HTSUS is made in accordance with the General Rules of Interpretation ("GRIs"). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied.

The Harmonized Commodity Description and Coding System Explanatory Notes ("ENs") constitute the official interpretation of the Harmonized System at the international level. While neither legally binding nor dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings. See T.D. 89–80.

The HTSUS provisions under consideration are as follows:

8470	Calculator machines and pocket-size data recording, reproducing and displaying machines with calculating functions; accounting machines, postage-franking machines, ticket issuing machines and similar machines incorporating a calculating device; cash registers:
8470.10.00	Electronic calculators capable of operation without an external source of electric power and pocket-size data recording, reproducing and displaying machines with calculating functions
8471	Automatic data processing machines and units thereof; magnetic or optical readers, machines for transcribing data onto data media in coded form and machines for processing such data, not elsewhere specified or included:
8471.30.00	Portable digital automatic data processing machines weighing not more than 10 kg, consisting of at least a central processing unit, a keyboard and a display
8524	Records, tapes and other recorded media for sound or other similarly recorded phenomena, including matrices and masters for the production of records, but excluding products of chapter 37:

8524.39	Other:
8524.39.4000	For reproducing representations of instructions, data, sound and image, recorded in a machine readable binary form, and capable of being manipulated or providing interactivity to a user, by means of an automatic data processing machine; proprietary format recorded discs.
8524.99	Other:
8524.99.4000	Other.
8525	Transmission apparatus for radiotelephony, radiotelegraphy, radiobroadcasting or television, whether or not incorporating reception apparatus or sound recording or reproducing apparatus; television cameras; still image video cameras or other video camera recorders:

You state in your letter that the Palm VII™ series of electronic devices are digital devices that are classifiable as automatic data processing machines under heading 8471, HTSUS. Automatic data processing ("ADP") machines are commonly and commercially known as computers. Note 5(A) to chapter 84, HTSUS, provides a definition for the term "automatic data processing machines" for the purposes of heading 8471. The definition is expressed in terms of the abilities an ADP machine possesses. Chapter 84, Note 5 (A)(a) states that a digital machine must be capable of:

(1) storing the processing program or programs and at least the data immediately necessary for execution of the program;
(2) being freely programmed in accordance with the requirements of the user;
(3) performing arithmetical computations specified by the user; and
(4) executing, without human intervention, a processing program which requires them to modify their execution, by logical decisions during the processing run.

We take the arguments you make in your submission into consideration when making a determination as to whether or not the Palm VII™ series meets the requirements of Note 5(A) of chapter 84.

Note 5(A)(a)(1): Storing the Processing Program or Programs and at Least the Data Immediately Necessary for Execution of the Program

The Palm VII™ and VIIx™ satisfy Note 5(A)(a)(1) in that they are capable of storing the processing program or programs and at least the data immediately necessary for the execution of programs in their RAM and ROM by (1) incorporating an operating system that controls the running of other programs, and (2) containing sufficient memory to store and execute standard applications such as the date book, memo pad and calculator, as well as other programs which may be added or created by the user.

Note 5(A)(a)(2): Being Freely Programmed in Accordance with the Requirements of the User

Customs has previously dealt with the issue of whether an ADP machine is capable of being freely programmed in accordance with the requirements of the user, or "freely programmable." In HQ 952862, dated November 1, 1994, Customs considered the classification of systems for radio frequency collection and transmission of data for industrial control. In that ruling, Customs determined that the data collection devices, while having some processing capability, were not "freely programmable." In determining whether a particular machine was "freely programmable," Customs examined the definition of the terms "computer" and "personal computer." HQ 952862 indicated that:

> A computer, which is freely programmable, is a "[g]eneral-purpose machine that processes data according to a set of instructions that are stored internally either temporarily or permanently." A. Freedman, The Computer Glossary, Sixth Edition, pg. 95 (1993). A personal computer "is functionally similar to larger computers, but serves only one user. It is used at home and in the office for almost all applications traditionally performed on larger computers." Computer Glossary (1993), pg. 400. Personal Computers "are typically used for applications, such as word processing, spreadsheets, database management and various graphics-based programs, such as computer-aided design (CAD) and desktop publishing. They are also used to handle traditional business applications, such as invoicing, payroll and general ledger. At home, personal computers are primarily used for games, education and word processing." A. Freedman, The Computer Glossary, Fourth Edition, pg. 524 (1989). Because they can perform any of the above-listed applications, personal computers are considered to be "freely programmable."

Customs notes the rapid evolution of the modern day digital computer and its expansion in capabilities over the years. The so-called "first generation" of computers was characterized by the use of wired circuits containing vacuum tubes and used punched cards as the main storage medium. These machines, such as Colossus (designed to decode German messages during World War II), the Harvard Mark I and ENIAC ("Electronic Numerator, Integrator, Analyzer, and Computer"; some sources have "and Calculator") were enormous in size and utilized made-to-order operating instructions to accomplish specific tasks. Each computer had a different binary-coded program, called a "machine language," that instructed it on how to operate. Changing the programming of the computer required an operator to change the wiring of that machine, often by changing a plug board on the side of a computer.

"Second generation" computers were defined by the replacement of vacuum tubes with solid-state components. The invention of the transistor allowed computers to become smaller, faster and more reliable. By 1965, most businesses routinely used second generation computers to process financial information. Using magnetic-core memory, these computers were able to store programs. Because programs were now contained inside a computer's memory, the computer could run a specific function, and then quickly change to perform another function, without the need to physically change the machine. More sophisticated programming languages, such as FORTRAN (Formula Translator) and COBOL (Common Business-Oriented Language) replaced the binary code of the computers predecessors, and new careers such as computer programmer and analyst were created.

"Third generation" computers benefited from the invention of integrated circuits and semiconductors. These are also the first computers to utilize an operating system that would allow the computer to run a variety of programs at once with a central program that monitored and coordinated the computers' memory.

"Fourth generation" computers became smaller and more affordable. By the mid-1970's, computers were brought to the general public by companies such as Commodore, Radio Shack and Apple. IBM introduced the personal computer ("PC") in the early 1980's. These computers became more powerful and entire software industries were created to provide programs that utilized the processing functions of these machines.

Now, the "fifth generation" of computers is in its infancy, and is characterized by the utilization of superconductors and parallel processing, which allows many CPU's to work as one.

Throughout this span, the ability of the computer to be freely programmed in accordance with the requirements of the user has become simpler. From machines that were dedicated to a single purpose (such as Colossus) to having the ability to switch between programs to serve different functions, computers have become more adaptable, and thus become freely programmable.

Customs believes that a freely programmable ADP machine is one that applications can be written for, does not impose artificial limitations upon such applications, and will accept new applications that allow the user to manipulate the data as deemed necessary by the user.

The Palm VII™ series handhelds satisfy Note 5(A)(a)(2) in that they are freely programmed in accordance with the requirements of the user in several ways:

Directly on the Palm VII™ series: various commercial development tools can be used to program the Palm VII™ series devices without any host computer, such as Pocket C, Quatrus Forth and LispMe. Programs are written by the user in a third generation language on the Palm memo pad and then compiled using the computer. The compiled program is then stored to be executed on demand on the device.

With a host computer to generate a generic application: a generic program can be developed in a host computer using the appropriate high-level development environment (e.g., Java). The program is checked and encoded in a generic way. It can then be downloaded to the Palm VII™ series via the Hotsync, where it is stored and retained. When loaded, it can be executed on demand on top of the related runtime engine to complete the task required by the user.

With a host computer to generate a native application: a Palm specific program can be developed for the Palm VII™ series handheld device with a host computer (with Windows, Macintosh, Unix, etc. OS) using the appropriate development tools and third generation language (e.g., Code Warrior C, C). The program is compiled in machine language, which the computer can read, and downloaded to

the Palm, where it is stored and retained. The program can then be executed on demand.

In analyzing whether Note 5(A)(a)(2) is satisfied, we also considered the following pertinent factors:

(a) the Palm Operating System is an open operating system;

(b) programming tools are readily available to any user either directly from Palm or from other commercial sources;

(c) the fact that hundreds of software applications are currently available for the Palm OS through a variety of vendors who distribute them either as freeware, shareware, or commercial applications. These range in function and utility from business (such as code-scanning inventory trackers) and educational (such as grade-calculating spreadsheets) programs to engineering (such as car-engine diagnostics) and other programs.

Note 5(A)(a)(3): Performing Arithmetical Computations Specified by the User

The Palm VII™ series handhelds satisfy Note 5(A)(a)(3) in that the Palm VII™ series each contain a Motorola microprocessor which can perform complex arithmetic computations. For example, using a computer programming language, the user may create a program which instructs the device to add simple integers together, or compute more complex arithmetical instructions.

Note 5(A)(a)(4): Executing, Without Human Intervention, a Processing Program Which Requires Them to Modify Their Execution, by Logical Decision During the Processing Run

The Palm VII™ series handhelds appear to satisfy Note 5(A)(a)(4) in that they can execute, without human intervention a processing program which requires the devices to modify their execution, by logical decision during a processing run. It is possible to write a program using the aforementioned applications that contain logic instructions. Using logical operators such as "and," "or," "not" and using Pocket C, one can compile and then execute the program without human intervention.

After careful consideration and examination of your arguments as to the features, functions and capabilities of the Palm VII™ series, for the preceding reasons, we have come to the conclusion that the Palm VII™ and VIIx™ meet the requirements set forth in Note 5(A)(a) of chapter 84.

The Palm VII™ and VIIx™ are handheld electronic devices combined with a two-way wireless radio. As such, they are composite machines under Section XVI, Note 3, HTSUS, which provides as follows:

> Unless the context otherwise requires, composite machines consisting of two or more machines fitted together to form a whole and other machines adapted for the purpose of performing two or more complementary or alternative functions are to be classified as if consisting only of that component or as being that machine which performs the principal function.

As noted above, the articles consist of a handheld electronic device that is coupled with a two-way wireless transmitter/receiver with its own integrated antenna. The wireless radio component of the Palm VII series allows two-way wireless connections to the Internet. The articles at issue here principally function as handheld electronic devices whose capabilities are enhanced by the addition of wireless and infrared connectivity to enable the transmission and reception of data. Even without the wireless capabilities, the Palm VII series would still be able to function as organizers, address books, or run various other utility programs available for the devices. For this reason, we find that by the terms of Note 3 to Section XVI, the articles do not fall to be classified in heading 8525.

Through application of GRI 1, utilizing the terms of the headings and relative section and chapter notes, Customs finds that the Palm VII™ series handheld electronic devices meet the terms of heading 8471, HTSUS. For the foregoing reasons, the Palm VII™ series handheld electronic devices are classified under subheading 8471.30.00, HTSUS, which provides for: "[a]utomatic data processing machines and units thereof; magnetic or optical readers, machines for transcribing data onto data media in coded form and machines for processing such data, not elsewhere specified or included: Portable digital automatic data processing machines weighing not more than 10 kg, consisting of at least a central processing unit, a keyboard and a display."

Because the Palm VII™ series of handheld electronic computers are defined for tariff purposes as ADP machines of heading 8471, HTSUS, they are precluded from classifica-

tion under heading 8470, HTSUS. The ENs to heading 8470 indicate that the heading **does not cover:** (a) data processing machines of **heading 84.71** (emphasis original, page 1401).

Palm Retail Sets

As indicated above, the Palm VII™ and VIIx™ could be imported both separately in bulk or as retail sets packaged with additional components such as a HotSync cradle, Palm Desktop Software, a handbook and guide, two AAA batteries, a DB-25 adapter and a protective carrying case. If imported as packaged sets, the goods are ready for retail sale without the need for repackaging.

The classification of goods put up in sets for retail sale is governed by GRI 3(b). GRI 3(b) provides, in relevant part, that goods put up for retail sale shall be classified as if they consisted of the material or component which gives them their essential character. According to the ENs for GRI 3(b), "goods put up in sets for retail sale" refers to goods which:

(1) consist of at least two different articles which are, *prima facie*, classifiable in different headings;
(2) consist of products or articles put up together to meet a particular need or carry out a specific activity; and
(3) are put up in a manner suitable for sale directly to users without repacking.

As indicated in your letter, the Palm series handheld retail sets meet all three of the ENs criteria for "goods put up in sets for retail sale." First, the Palm VII™ handheld retail sets consist of numerous articles, which, if imported separately, would be classifiable in different headings. Second, all of the components placed in the Palm VII™ handhelds retail sets are put up together to allow the Palm VII™ handhelds to function as portable computers. Third, in their imported condition, the Palm VII™ handheld retail sets are packaged in a manner suitable for retail sale to the ultimate purchaser, without the need for further repackaging. Accordingly, pursuant to GRI 3(b), the Palm VII™ series handheld retail sets are properly classified, as are single units, under subheading 8471.30.00, HTSUS, which is the subheading under which the Palm VII™ series handhelds, which provide the retail sets with their essential character, are classified.

However, Chapter 85, Note 6 states that, "[r]ecords, tapes and other media of heading 8523 or 8524 remain classified in those headings, whether or not they are entered with the apparatus for which they are intended." Thus, the applicable subheading for the Palm Desktop organizer software on a CD-ROM will be 8524.39.40, HTSUS, which provides for "[r]ecords, tapes and other recorded media for sound or other similarly recorded phenomena * * * [d]iscs for laser reading systems: [o]ther: [f]or reproducing representations of instructions, data, sound and image, recorded in a machine readable binary form, and capable of being manipulated or providing interactivity to a user, by means of an automatic data processing machine * * *."

The applicable subheading for the Palm Desktop organizer software on diskettes will be 8524.99.40, HTSUS, which provides for "[r]ecords, tapes and other recorded media for sound or other similarly recorded phenomena * * * [o]ther: [o]ther: [o]ther."

Holding:

For the reasons stated above, the Palm VII™ and VIIx™ handheld computers, when imported separately, are to be classified under subheading 8471.30.00, HTSUS, which provides for "[a]utomatic data processing machines and units thereof; magnetic or optical readers, machines for transcribing data onto data media in coded form and machines for processing such data, not elsewhere specified or included: Portable digital automatic data processing machines weighing not more than 10 kg, consisting of at least a central processing unit, a keyboard and a display."

The applicable classification for the Palm VII™ series retail set will also be subheading 8471.30.00, HTSUS.

The applicable subheading for the Palm Desktop organizer software on a CD-ROM will be 8524.39.40, HTSUS, which provides for "[r]ecords, tapes and other recorded media for sound or other similarly recorded phenomena * * * [d]iscs for laser reading systems: [o]ther: [f]or reproducing representations of instructions, data, sound and image, recorded in a machine readable binary form, and capable of being manipulated or providing interactivity to a user, by means of an automatic data processing machine * * *."

The applicable subheading for the Palm Desktop organizer software on diskettes will be 8524.99.40, HTSUS, which provides for "[r]ecords, tapes and other recorded media for sound or other similarly recorded phenomena * * * [o]ther: [o]ther: [o]ther."

Effect on Other Rulings:
NY F89667 is revoked.

JOHN DURANT,
Director,
Commercial Rulings Division.

REVOCATION OF RULING LETTER AND TREATMENT RELATING TO TARIFF CLASSIFICATION OF THE MICRO TRUK

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of ruling letter and treatment relating to tariff classification of the Micro Truk.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking a ruling relating to the tariff classification of the Micro Truk, and revoking any treatment Customs has previously accorded to substantially identical transactions. Notice of the proposed revocation was published on September 26, 2001, in the CUSTOMS BULLETIN.

EFFECTIVE DATE: This revocation is effective for merchandise entered or withdrawn from warehouse for consumption on or after January 21, 2002.

FOR FURTHER INFORMATION CONTACT: James A. Seal, Commercial Rulings Division (202) 927–0760.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **informed compliance** and **shared responsibility**. These concepts are based on the premise that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's rights and responsibilities under the

Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484, Tariff Act of 1930, as amended (19 U.S.C. 1484), the importer of record is responsible for using reasonable care to enter, classify and declare value on imported merchandise, and to provide other necessary information to enable Customs to properly assess duties, collect accurate statistics and determine whether any other legal requirement is met.

Pursuant to Customs obligations, a notice was published on September 26, 2001, in the CUSTOMS BULLETIN, Volume 35, Number 39, proposing to revoke *NY* F82672, dated February 11, 2000. This ruling classified the Micro Truk as a motor vehicle for the transport of goods, in subheading 8704.31.00, Harmonized Tariff Schedule of the United States (HTSUS). No comments were received in response to this notice.

As stated in the proposed notice, this revocation will cover any rulings on this merchandise which may exist but have not been specifically identified. Any party who has received an interpretative ruling or decision (i.e., ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice, should have advised Customs during the comment period. Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, Customs is revoking any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the HTSUS. Any person involved in substantially identical transactions should have advised Customs during this notice period. An importer's reliance on a treatment of substantially identical transactions or on a specific ruling concerning the merchandise covered by this notice which was not identified in this notice may raise the rebuttable presumption of lack of reasonable care on the part of the importer or its agents for importations subsequent to the effective date of this final decision.

Pursuant to 19 U.S.C. 1625(c)(1), Customs is revoking *NY* F82672 to reflect the proper classification of the Micro Truk in subheading 8709.19.00, HTSUS, as a self-propelled works truck, pursuant to the analysis in *HQ* 965246, which is set forth as the Attachment to this document. Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs is revoking any treatment it previously accorded to substantially identical transactions.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after publication in the CUSTOMS BULLETIN.

Dated: November 6, 2001.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, November 6, 2001.

CLA–2 RR:CR:GC 965246 JAS
Category: Classification
Tariff No. 8709.19.00

MR. HARVEY B. FOX
ADDUCI, MASTRIANI & SCHAUMBERG, L.L.P.
1200 Seventeenth Street, N.W.
Washington, DC 20036

Re: Micro Truk; *NY* F82672 Revoked.

DEAR MR. FOX:

This is in response to your letter of October 16, 2000, on behalf of Metro Motors Corporation, requesting reconsideration of *NY* F82672, concerning the classification under the Harmonized Tariff Schedule of the United States (HTSUS), of the Micro Truk. In this ruling, which the Director of Customs National Commodity Specialist Division, New York, issued to Metro Motors on February 11, 2000, the Micro Truk was held to be classifiable as a motor vehicle for the transport of goods, in subheading 8704.31.00, HTSUS.

Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed revocation of *NY* F82672 was published on September 26, 2001, in the CUSTOMS BULLETIN, Volume 35, Number 39. No comments were received in response to that notice.

Facts:

The Micro Truck was described in the cited ruling as having a cab for two people and a rear cargo bed with fold down sides and tailgate. It is available as a 130-inch Standard Bed, model 1010, or a 145-inch Long Bed, model 1020. The vehicle is powered by a 38 hp, gasoline powered spark ignition internal combustion engine, and has a 3-speed manual transmission and 4-wheel hydraulic brakes. Design features include front bumper, headlights, taillights, brake lights and turn signals, and four-way flashers. The Micro Truk is equipped with two-speed intermittent wipers with washer, heater/defroster, inside/outside rearview mirrors, seat belts and dome light.

The Micro Truk is capable of a 25 mph maximum speed and is not advertised for use on the public roads. The vehicle is advertised for use in landscaping, facility maintenance, security, i.e., police fire protection, food service delivery, and in athletic applications such as removing injured players from the field and moving around equipment and personnel.

The HTSUS provisions under consideration are as follows:

8704	Motor vehicles for the transport of goods:
	Other, with spark-ignition internal combustion piston engine:
8704.31.00	G.V.W. not exceeding 5 metric tons

*	*	*	*	*	*	*	

8709	Works trucks, self-propelled, not fitted with lifting or handling equipment, of the type used in factories, warehouses, dock areas or airports for short distance transport of goods; * * *; parts of the foregoing vehicles * * *:
	Vehicles:
8709.11.00	Electrical
8709.19.00	Other

Issue:

Whether the Micro Truk, as described, is a works truck of heading 8709.

Law and Analysis:

Under General Rule of Interpretation (GRI) 1, Harmonized Tariff Schedule of the United States (HTSUS), goods are to be classified according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6.

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized System at the international level. Though not dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS. Customs believes the ENs should always be consulted. *See* T.D. 89–80. 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

The Micro Truk is at least *prima facie* described by the terms of heading 8704, HTSUS, as a motor vehicle for the transport of goods. However, we do not believe that a specificity analysis is warranted here. This is because the ENs on p. 1554 list certain design features of the works trucks of heading 8709, HTSUS, which distinguish them from the vehicles of heading 8704. Among these are their construction and special design features which make them unsuitable for the transport of goods by road or other public ways; their top speed when laden is generally not more than 30 to 35 km/h; their turning radius is approximately equal to the length of the vehicle itself; vehicles of heading 8709 do not usually have a closed driving cab, the accommodation for the driver often being no more than a platform on which to stand. Certain types may be equipped with a protective frame or metal screen; such works trucks are normally fitted with a platform or container on which the goods are loaded.

Vehicles similar to the Micro Truk are marketed to a wide range of potential users with the vehicles' intended purpose in mind, i.e., work. They are sold for use in golf course maintenance, to haul fertilizer, sand, etc., even personnel. These uses have expanded to include hunters and other recreational users and their gear. Among the users are universities with closed campuses and businesses with large areas to cover but limited road access, in transporting materials, security personnel, etc. Some vehicles even have specially constructed beds for stretchers for use by medical-rescue teams in rough terrain.

However, heading 8709 covers vehicles of a kind used in the environments specified in the text. This is a provision governed by "use." *See Group Italglass v. United States*, 17 CIT 226 (1993). As such, it is the principal use of the class or kind of vehicles to which the Micro Truk belongs that governs classification here.

Because of the wide range of potential uses, both on and off-road, we will focus our attention on the 8709 ENs. As described, the Micro Truk is equipped with numerous design features common to small pickup trucks. Also included are comfort and convenience items like interior mirrors, shoulder and lap restraints, and safety glass. The latter suggest significant on-road uses. However, in a letter to Metro Motors, dated January 25, 1999, the National Highway Traffic Safety Administration, U.S. Department of Transportation, examined numerous factors related to the Micro Truk, and concluded that it was not a "motor vehicle" for purpose of regulations administered by that agency. The Micro Truk's advertised speed of 25 mph is apparently an unladen speed. Additional information now available indicates that the Micro Truk's top speed with a standard payload is 20 mph or 33 km/h. This is within the parameters stated in the ENs. The overall length of the Micro Truk, either 130 inches (Standard Bed) and 145 inches (Long Bed), is "approximately" equal to the vehicle's minimum radius, which is listed in submitted specifications as 149 inches. Finally, whether the Micro Truk's enclosed cargo bed with drop-down sides and tailgate qualifies as a platform or container on which the goods are loaded is uncertain. However, the vehicle does have a closed driving cab, which is not characteristic of vehicles of heading 8709.

We conclude that, on balance, the Micro Truk, as described, has a majority of the design features listed in the 8709 ENs as common to vehicles of that heading. For this reason, the Micro Truk belongs to the class or kind of vehicles principally used as a works truck of heading 8709. This conclusion is consistent with the classification of utility vehicles deemed substantially similar in terms of design and intended service applications to the Micro Truk. *See*, for example, the Mule utility vehicle (*HQ* 954173, dated September 22, 1993), the Gator utility vehicle (*NY* C83109, dated January 29, 1998), and the Carryall utility vehicle (*HQ* 960303, dated May 13, 1997).

Holding:

Under the authority of GRI 1, the Micro Truk is provided for in heading 8709. It is classifiable in subheading 8709.19.00, HTSUS.

Effect on Other Rulings:

NY F82672, dated February 11, 2000, is revoked. In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

PROPOSED REVOCATION OR MODIFICATION OF RULING LETTERS AND TREATMENT RELATING TO THE COUNTRY OF ORIGIN DETERMINATION OF PIPE FITTINGS AND FLANGES

AGENCY: U.S. Customs Service, Department of Treasury.

ACTION: Notice of proposed revocation or modification of ruling letters and treatment relating to the country of origin of pipe fittings and flanges.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke or modify (as applicable) ruling letters pertaining to the country of origin determination of pipe fittings and flanges. Comments are invited concerning the correctness of the intended action.

DATE: Comments must be received on or before December 21, 2001.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations & Rulings, Attention: Commercial Rulings Division, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Comments submitted may be inspected at the same address.

FOR FURTHER INFORMATION CONTACT: Monika Brenner, Special Classification & Marking Branch, (202) 927–1254.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L.

103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **"informed compliance"** and **"shared responsibility."** These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly access duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Implementation Act, Pub. L. 103–82, 187 Stat. 2057, 2186, (1993), this notice advises interested parties that Customs intends to revoke or modify certain rulings (as applicable) pertaining to the country of origin determinations of pipe fittings and flanges. In this notice Customs is specifically referring to Headquarters Ruling Letter (HRL) 559871 dated February 18, 1997; HRL 700022 dated October 27, 1972; 728693 dated November 5, 1985; HRL 730416 dated May 11, 1987; and HRL 734673 dated December 17, 1992. However, this notice covers any rulings on pipe fittings and flanges which may exist but have not been specifically identified and that are based on the same rationale. Customs has undertaken reasonable efforts to search existing databases; no further rulings have been found. Any party who has received an interpretative ruling or decision (*i.e.*, ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, other than the referenced rulings (see above), should advise Customs during this notice period. Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, Customs intends to revoke any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, or Customs personnel applying a ruling of a third party to importations of the same or similar merchandise. Any person involved in substantially identical transactions should advise Customs during this notice period. An importer's failure to advise Customs of substantially identical transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or his agents for importations of merchandise subsequent to this notice.

On March 14, 2000, Customs published a final interpretation, Treasury Decision (T.D.) 00–15, in the Federal Register (65 FR 13827), advising the public that Customs did not intend to rely on the distinction between producers' goods and consumers' goods in making country of origin marking determinations. Customs also stated that all pipe fittings and flanges produced in the United States from imported forgings must be marked with the country of origin of the imported forging. Customs further stated that parties who have received rulings based on the producers' goods-consumers' goods analysis articulated in *Midwood Industries Inc. v. United States*, 313 F. Supp. 951 (Cust. Ct. 1970), *appeal dismissed* 57 CCPA 141 (1970), could continue to rely on those rulings unless and until Customs modifies or revokes them pursuant to 19 U.S.C. 1625. Pursuant to 19 U.S.C. 1625(c)(1), Customs informed interested parties in the CUSTOMS BULLETIN, Volume 34, Number 23 (June 7, 2000), that it intended to revoke or modify (as applicable) HRLs 559871, 700022, 728693, 730416, 732883, and 734673, and any other rulings not specifically identified. The revocation/modification was published in the CUSTOMS BULLETIN, Volume 34, Number 31 (August 2, 2000).

In *Boltex Manufacturing Co., L.P. et. al., v. United States*, 140 F. Supp. 2d 1339 (CIT 2000), the United States Court of International Trade (CIT) was asked by plaintiffs, certain importers of carbon and stainless steel forgings, to vacate T.D. 00–15. In discussing the background of the suit seeking to vacate T.D. 00–15, the CIT took note of *Midwood Industries v. United States*, 313 F. Supp. 951 (Cust. Ct. 1970), *appeal dismissed*, 57 C.C.P.A. 141 (1970), where the Customs Court held that the ultimate purchaser of certain steel forgings was the processor in the United States that converted them to pipe fittings and flanges. 140 F. Supp. 2d at 1342, *citing* 313 F. Supp. at 952. The CIT also took note of the NAFTA Marking Rules, promulgated by T.D. 95–69, 60 FR 46188 (1995), which, in part, appear in 19 CFR 102.20, and provide with respect to heading 7307 that pipe fittings and flanges must be marked with the country of origin of the forgings themselves. *Id.* The CIT found a contrast between Customs publication of its "Notice of Proposed Interpretation; Solicitation of Comments: Application of Producers' Good Versus Consumers' Good Test in Determining Country of Origin Marking," 63 FR 14751 (1998), and the Final Interpretation, T.D. 00–15, noting that the final interpretation "was the first public discussion by Customs that a change in marking would be required." *Id.* at 1345. In both notices, Customs indicated it no longer intended to rely on the producers' goods-consumers' good distinction in making country of origin determinations. However, the court noted Customs statement in the Notice of Proposed Interpretation that "if this proposal is adopted, parties may seek clarification regarding the continued viability of any ruling that they believe was based on the producers' goods-consumers' goods analysis articulated in *Midwood*"; whereas in the Final Interpretation, the court noted Customs statement that "the change in treatment * * * will place all importers of pipe fittings and flanges on an equal

footing * * * [and] all pipe fittings and flanges produced in the United States from imported forgings [will] be [required to be] marked with the country of origin of the imported forging." *Id.* at 1344, 1345.

The CIT determined that Customs had abused its discretion by "encroach[ing] upon judicial authority" in determining that *Midwood* "was no longer good law," and "relying on a legal conclusion that the producers' good-consumers' goods distinction is no longer good law, rather than engaging in and providing a reasoned factual analysis" in determining that the forgings had to be marked. *Id.* at. 1347, 1348. The CIT noted in several instances that each case must be decided on its own particular facts. The CIT also noted that because "each import entry is considered a separate cause of action, Customs has always enjoyed the discretion not to apply a decision of this court to later-imported entries, even of the same merchandise." *Id.* at 1346 (*citing United States v. Stone & Downer Co.*, 274 U.S. 225 (1927); and *Id.* at 1349 (*citing Uniroyal, Inc. v. United States*, 542 F. Supp. 1026 (CIT 1982)). The CIT stated that *Midwood* still is good law, although Customs need not rely upon it in all instances, and that "it may well be possible that *Midwood* would be decided differently today." *Id.* at 1351. The CIT agreed with the plaintiff that Customs "is prevented from imposing a new marking requirement on United States pipe fittings and flanges in contravention of the *Midwood* holding." *Id.* However, the CIT stated that:

> Here, if Customs believes that the matters decided in Midwood have not remained static factually and legally, and that there have been intervening changes in the legal climate in the past thirty years which would require a different result, it should be given the opportunity to so demonstrate. It must do so, however, by giving reasons for its position based on facts and not by usurping a judicial function. If it can make the requisite showing, and is upheld upon any court review, it can change the marking requirements * * *. No business is guaranteed an unchanged regulatory climate.

Id. at 1352. In response, on September 27, 2000, Customs rescinded the action announced in the August 2, 2000, "CUSTOMS BULLETIN" notice, which had relied on the now vacated T.D. 00–15.

In this notice, Customs now is proposing to revoke and modify the rulings at issue based on the judicial guidance provided in the decision in *Boltex* and upon further analysis of the specific factual circumstances presented. Customs has concluded that under the decisions of the CIT and the U.S. Court of Appeals for the Federal Circuit, there in fact has been no change in name, character, and use as a result of the processing performed in the United States in these particular cases. Accordingly, we conclude that the importer/U.S. processor is not the ultimate purchaser in these particular cases. Therefore, we find that the steel flanges and pipe fittings processed from forgings in these cases, will be required to be marked with the country of origin of the forging.

Specifically, pursuant to section 625(c)(1), Tariff Act of 1930 (U.S.C. 1625(c)(1)), this notice advises interested parties that Customs proposes to revoke or modify (as applicable) HRLs 559871, 700022, 728693,

730416, and 734673 (set forth as Attachments A-E) and any other rulings not specifically identified that are substantially identical to these rulings.[1] In this proposal, the proper marking of the merchandise is set forth pursuant to the analysis in Proposed HRLs 561925, 561927, 561928, 561929, and 561931 (set forth as Attachments F-J). Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs intends to revoke any treatment previously accorded by the Customs Service to substantially identical merchandise. Before taking this action, consideration will be given to any written comments timely received.

Dated: November 6, 2001.

MYLES HARMON,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, February 18, 1997.

MAR-2-05 RR:TC:SM 559871 MLR
Category: Marking

LAURENCE J. LASOFF, ESQ.
JOHN B. BREW, ESQ.
LAURA A. SVAT, ESQ.
COLLIER, SHANNON, RILL & SCOTT, PLLC
3050 K Street, N.W.
Suite 400
Washington, DC 20007

Re: Country of origin marking for stainless steel forgings from Mexico, Italy and Germany; substantial transformation; Midwood; NAFTA; Article 509.

DEAR MR. LASOFF, MR. BREW, AND MS. SVAT:

This is in reference to your letter of May 28, 1996, requesting a ruling on behalf of your client, concerning the country of origin marking of stainless steel flanges, imported from Mexico, Germany, and Italy.

Facts:

You state that your client imports stainless steel forgings (also referred to as unfinished stainless steel flanges), classifiable under 7307.21.10, Harmonized Tariff Schedule of the United States (HTSUS), from Mexico, Germany, and Italy into the U.S. In the U.S., the forgings are machined into stainless steel flanges, classifiable under subheading 7307.21.50, HTSUS. You state that stainless steel flanges are generally manufactured using alloys such as 304/304L and 316/316L. The five general types of flanges, normally ranging in size from ½ to 30 inches, include (i) weld neck flanges (used for butt-weld line connections), (ii) threaded flanges (used for threaded line connections), (iii) slip-on and lap joint flanges (used with stub end/butt-weld line connections), (iv) socket weld flanges (used with fit pipe into machine recessions), and (v) blind flanges (used to seal off lines).

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[1] After re-examining HQ 732883, we note that it should not be modified, revoked, or included as part of this notice as the ruling is correct, given the articles under consideration involved the machining and the assembly of multiple essential components, one of which was an essential domestic component.

In producing a finished stainless steel flanges, you state that the entire forging is machined, which includes machining the backside, faceside, outside diameter, and bore, and drilling the bolt holes.

Issue:

What are the country of origin marking requirements applicable to the finished stainless steel flanges?

Law and Analysis:

The marking statute, section 304, Tariff Act of 1930, as amended (19 U.S.C. §1304), provides that, unless excepted, every article of foreign origin (or its container) imported into the U.S. shall be marked in a conspicuous place as legibly, indelibly and permanently as the nature of the article (or its container) will permit, in such a manner as to indicate to the ultimate purchaser in the U.S. the English name of the country of origin of the article. Part 134, Customs Regulations (19 C.F.R. Part 134) implements the country of origin marking requirements and exceptions of 19 U.S.C. §1304.

I. Stainless Steel Forgings Imported from Mexico

Section 134.1(b), Customs Regulations (19 C.F.R. §134.1(b)), defines "country of origin" as:

> The country of manufacture, production or growth of any article of foreign origin entering the U.S. Further work or material added to an article in another country must effect a substantial transformation in order to render such other country the "country of origin" within the meaning of this part; however for a good of a NAFTA country, the NAFTA Marking Rules will determine the country of origin. (Emphasis added.)

Section 134.1(j), Customs Regulations (19 C.F.R. §134.1(j)), provides that the "NAFTA Marking Rules" are the rules promulgated for purposes of determining whether a good is a good of a NAFTA country. A "good of a NAFTA country" is defined in 19 C.F.R. §134.1(g) as an article for which the country of origin is Canada, Mexico, or the U.S. as determined under the NAFTA Marking Rules set out at 19 C.F.R. Part 102.

Section 102.11, Customs Regulations (19 C.F.R. §102.11), sets forth the required hierarchy for determining whether a good is a good of a NAFTA country for marking purposes. Paragraph (a) of this section states that the country of origin of a good is the country in which:

> (1) The good is wholly obtained or produced;
> (2) The good is produced exclusively from domestic materials; or
> (3) Each foreign material incorporated in that good undergoes an applicable change in tariff classification set out in section 102.20 and satisfies any other applicable requirements of that section, and all other applicable requirements of these rules are satisfied.

In this case, the applicable rule is 19 C.F.R. §102.11(a)(3). The finished flanges are stated to be classifiable under subheading 7307.21.50, HTSUS. The applicable change in tariff classification for headings 7301–7307 set out in section 102.20(n), Section XV, Chapters 72 through 83, provides:

> 7301–7307 * * * A change to heading 7301 through 7307 from any other heading, including another heading within that group.

It is stated that the imported forgings are classifiable under subheading 7307.21.10, HTSUS. Therefore, the imported forgings will not undergo the requisite tariff shift, and 19 C.F.R. §102.11(b) of the hierarchial rules must be applied, which in pertinent part provides that:

Except for a good that is specifically described in the Harmonized System as a set, or is classified as a set pursuant to General Rule of Interpretation 3, where the country of origin cannot be determined under paragraph (a), the country of origin of the good:

> (1) Is the country or countries of origin of the single material that imparts the essential character of the good * * *

When determining the essential character of a good under 19 C.F.R. §102.11, 19 C.F.R. §102.18(b)(1) provides that only domestic and foreign materials that are classified in a tariff provision from which a change is not allowed shall be taken into consideration. Section 102.18(b)(1)(iii), Customs Regulations (19 C.F.R. §102.18(b)(1)(iii)), provides that if there is only one material that is classified in a tariff provision from which a change in tariff clas-

sification is not allowed, then that material will represent the single material that imparts the essential character to the good under 19 C.F.R. §102.11.

Pursuant to 19 C.F.R. §102.18(b)(1)(iii), the single material that imparts the essential character of the finished flange is the forging. Accordingly, the country of origin of the finished stainless steel flange is the country of origin of the forging, which is Mexico.

II. Stainless Steel Forgings Imported from Italy and Germany

In regard to the stainless steel forgings imported from non-NAFTA countries which are finished into flanges in the U.S., you contend that the finished flanges are not being marked with their country of origin as required by U.S. law. In order for the country of origin of the flanges to be considered the U.S., the work or material added to the forgings in the U.S. must effect a substantial transformation. 19 C.F.R. §134.1(b).

For country of origin marking purposes, a substantial transformation of an imported article occurs when it is used in the U.S. in manufacture, which results in an article having a name, character, or use differing from that of the imported article. In such circumstances, the manufacturer or processor in the U.S. who converts or combines the imported article into the different article will be considered the "ultimate purchaser" of the imported article, and the article is excepted from marking and only the outermost container is required to be marked. See 19 C.F.R. §134.35(a).

You contend that imported forgings which are machined in the U.S. are not substantially transformed in the U.S. when they are made into flanges. In Midwood Industries, Inc. v. United States, 64 Cust. Ct. 499, 313 F. Supp. 951 (1970), imported rough steel forgings were subjected to several machining processes by the U.S. importer/processor such as boring, facing, spot facing, drilling, tapering, threading, beveling and heating and compressing. The court pointed out that the rough forgings have no commercial use in their imported condition because the forgings are used to connect pipes of a matching size and in their imported state, the forgings had no connecting ends. It was determined that the importer/processor was the ultimate purchaser of the forgings since he substantially transformed them and the resulting finished flanges and fittings did not have to carry country of origin marking.

You claim that Midwood is no longer valid law and is not applicable to the facts presented. You note that the NAFTA Marking Rules were intended to codify existing country of origin marking practice on articles imported from any country as indicated in Customs notice of proposed rulemaking issued at 59 FR 141 (January 3, 1994), and further clarified at 60 FR 22,312 (May 5, 1995). In 61 FR 28932, 28933 (June 6, 1996), in connection with the Final Rule for Determining the Country of Origin of a Good for Purposes of Annex 311 of the North American Free Trade Agreement, Customs decided that the proposal to extend Section 102 to all trade, as reflected in the May 5, 1995, notice of proposed rulemaking, should not be adopted as a final rule at this time. Therefore, the NAFTA Marking Rules do not apply for purposes of country of origin marking determinations from non-NAFTA countries, and the duly promulgated NAFTA Marking regulations which do not codify the Midwood decision, is only applicable for purposes of determining when a good is a good of a NAFTA country.

The next question to be resolved is whether Midwood is still applicable to the facts presented. Customs, in setting forth its rationale for the NAFTA Marking Rules and in examining Midwood stated that it did not believe that a court is bound to follow the reasoning of Midwood because the court's decision involved the manufacturing processes of only one single company and did not determine whether these processes were generally prevalent throughout any segment of the industry in the U.S. See 60 FR 22,315. However, after notice and comment in the Federal Register, the NAFTA Marking Rules set forth at 19 C.F.R. Part 102 were not adopted for all trade, and the Midwood decision, while questioned in subsequent court decisions, has not been overruled. Accordingly, to the extent that forgings are not imported from a NAFTA Party, the NAFTA Marking Rules will not apply. In the absence of other information that the flanges being imported from non-NAFTA countries are undergoing operations that are different from the processes performed in Midwood, the Midwood case still will be applicable for determining the country of origin marking requirements. Therefore, steel flanges processed from forgings of Italian or German origin, as described above, will not require any country of origin marking for Customs purposes.

Holding:

Based upon the information provided, for the forgings imported from Mexico, pursuant to 19 C.F.R. §102.18(b)(1)(iii), the country of origin of the finished stainless steel flanges is the country of origin of the forging, which is Mexico. For the forgings imported from Italy or Germany, pursuant to 19 C.F.R. §134.35(a), the ultimate purchaser of the forgings is the U.S. processor. Accordingly, steel flanges processed from forgings of Italian or German origin, as described above, will not require any country of origin marking for Customs purposes.

A copy of this ruling letter should be attached to the entry documents filed at the time the goods are entered. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

JOHN DURANT,
Director
Tariff Classification Appeals Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, October 27, 1972.

RM 363.2 K 700022
Your Ref: MAR–2–DC 11

MR. HEINZ L. HERZ
DISTRICT DIRECTOR OF CUSTOMS
Chicago, IL 60607

Re: Edward E. Russell, Director, Classification & Value Division.

DEAR MR. HERZ:

This is in reply to your letter of September 13, 1972 (MAR–2–DC 11), referring to the Bureau's ruling of July 18, 1972 (RM 363.2 R, 700022), with respect to the country of origin marking of a shipment of unfinished welding fittings imported at the port of Chicago under entry No. XXXXXX, dated November 17, 1971. You enclosed copies of the complete file on this matter, including a letter dated August 1, 1972, from Weldbend Corporation, stating that the forgings in question were received by them in the original packaged form and were processed by them to make finished elbows, by bevelling, painting, and marking them. The marking refers to the name "Weldbend" and not the country of origin of the forgings, namely, Germany.

In reviewing this matter, it appears that each elbow was die stamped "Germany" on the extreme end where it was machined off in the process of finishing the elbow, and, in addition, the containers of the elbow forgings were marked to indicate the country of origin of the elbows. The evidence submitted also seems to be sufficient to indicate that the elbows were in fact imported in a rough forged condition and finished by Weldbend by finishing processes substantially similar to those described in the case of *Midwood Industries, Inc. v. United States* (C.D. 4026). We have noted that the invoice describes the goods as "Siekmann" seamless carbon steel welding fittings to ASA B 16.9 and ASTM A–234, WPD, unmachined and unmarked, only die stamped with "Germany" on the edge of each elbow, size of letters about ca. 2mm.

In the circumstances, the Bureau is of the opinion that Weldbend must be considered the ultimate purchaser of the forgings, in view of the decision in C.D. 4026. In effect, this decision overruled the Bureau's rulings in T.D. 68–57 and Circular MAR–2–RM, January 17, 1967. If the statement submitted by Weldbend on August 1, 1972, had been submitted at the time of entry, the shipment could have been released without any questions, since the die stamped markings on the elbows would have been sufficient to indicate the country of origin to the ultimate purchaser (Weldbend), assuming, of course, that these markings were legible, or, alternatively, the forgings could have been excepted from individual marking pursuant to 19 U.S.C. 1 304(a) (3) (D), since the marking of the container would reasonably indicate the country of origin to the ultimate purchaser.

The question now is whether or not the claim for redelivery, resulting in marking duties and possible liquidated damages, should be cancelled, since the certification from Weldbend was not presented at the time of entry. In this connection we have noted the statement of the court in another case involving welding fittings, *U.S. Wolfson Bros. Corp. v. United States* 52 CCR. 86, C.D. 2442 (1964), which involved a question of whether or not the fittings were delivered to ultimate purchasers in marked containers. At page 92, the court states "If there were clear evidence identifying certain tubes of this importation as having been delivered to *ultimate purchasers* in sufficiently marked containers, we might grant relief *pro tanto* as to such merchandise." Although the clear evidence was not presented in that case, the implication is that the court would have accepted such evidence If presented at the trial even though it had not been presented at the time of entry. In this case the Bureau is of the opinion that the clear evidence necessary has been presented, although belatedly, and accordingly, we are of the opinion that the claim for redelivery may be cancelled.

The importer should be advised that in the future the necessary statement from the ultimate purchaser, as well as from himself, should be presented at the time of entry, and you should also be satisfied that the articles are to be processed in a manner substantially similar to the fittings involved in C.D. 4026.

PAUL K. MCCARTHY,
Acting Director,
Entry Procedures and Penalties Division.

[ATTACHMENT C]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, November 5, 1985.

MAR–3 CO:R:E:E 728693 LR

This ruling concerns the country of origin marking requirements applicable to imported rough forge fittings of carbon steel which will be further processed in the United States.

Issues:

1. Does the placement of the country of origin at the edge of the article in such manner that it will be removed during manufacture satisfy the requirements of 19 U.S.C. 1304, as amended?
2. Are the country of origin markings on the subject forgings legible and conspicuous enough to satisfy the requirements of 19 U.S.C. 1304, as amended?

Facts:

A company imports rough forged fittings of carbon steel ("forgings") and further processes them into finished pipe fittings ("fittings") in the form of elbows or tees. (Elbows are two outlet fittings with a 90 degree bend in the pipe, and tees are T-shaped fittings with three outlets.) The further processing includes:

(1) Shot blasting—Rough forgings are cleaned of oxidation and mill scale from the exterior and interior surfaces;
(2) Machine bevelling, boring and tapering—Edges of forgings are cut-off, ends are bevelled to ANSI B16.9 length dimensions and inside diameters are bored and tapered to ANSI B16.9 tolerances;
(3) Grinding—Machined forgings are ground to remove surface imperfections resulting from forging or machining processes, per ASTM A234 specifications;
(4) Die stamping—Processed forgings are stamped with an identification of each heat lot number, parent material, size and wall thickness, per ASTM 234 specifications;
(5) Inspecting—Processed forgings are inspected for forging and machining flaws and surface defects, as well as thickness, length dimensions and inside and outside diameter tolerances per ASTM A234 and ANSI B16.9 specifications;

(6) Painting—Processed forgings are painted in a dip tank with an emulsion dipping primer as a protective coating;

(7) Certain elbows also undergo a hot forming process prior to bevelling which involves heating the rough forgings and compressing one end to reduce its size and diameter.

The word "Japan" is die stamped close to the edge of the forgings in letters approximately 1/16 inch tall. The clarity and distinctiveness of the letters varies. The processing performed by the importer will substantially or completely obliterate the country of origin markings.

Law and Analysis:

I

Section 304 of the Tariff Act of 1930, as amended (19 U.S.C. 1304) provides that all articles of foreign origin imported into the United States are required to be legibly, conspicuously, and permanently marked in such manner so as to indicate the country of origin *to an ultimate Purchaser in the United States* (emphasis added).

The ultimate purchaser is generally the last person in the United States who will receive the article in the form in which it was imported. 19 CFR 134.1(d). If an imported article will be used in manufacture, the manufacturer may be the "ultimate purchaser" if he subjects the imported article to a process which results in a substantial transformation of the article; however, if the manufacturing process is merely a minor one which leaves the identity of the imported article intact, the consumer or user of the article after the processing, will be regarded as the "ultimate purchaser." 19 CFR 134.1(d)(1)&(2).

Under the above principles, if the manufacturer/importer is the ultimate purchaser of an imported article which is legibly and conspicuously marked at the time of importation, the article will be found to be legally marked even if such marking will be removed during the subsequent manufacture.

In *Midwood Industries, Inc. v. United States*, 64 Cust. Ct. 499, C.D. 4026, 313 F. Supp. 951 (1970) the United States Customs Court considered the legal sufficiency of the country of origin marking on certain imported forgings subject to further processing. (the edges are cut off, the ends are bored, tapered and bevelled, die lines and other surface imperfections are removed, and the fitting is cleaned for the removal of oxidation and mill scale from the outer surface). Although the edges of the forgings were legibly and conspicuously marked at the time of importation, such marking would be obliterated or destroyed during the course of this processing. The Court found that the marking was sufficient because the processing substantially transformed the imported forgings making the processor the ultimate purchaser of the imported merchandise.

In this case, the imported forgings are processed in the same manner as the imported forgings in *Midwood*. As such, we find that the processing in this case similarly constitutes a substantial transformation and that the importer/processor is the ultimate purchaser of the imported merchandise. The question remains, however, whether the conclusion reached in *Midwood i.e.* that the imported steel forgings were properly marked, is controlling in light of the recent amendment to the marking statute pertaining to the marking of steel pipe fittings. Section 207 of the Tariff and Trade Act of 1984 (19 U.S.C. 1304(c)) states:

> *No exception may be made under subsection (a)(3) of this section* with respect to pipes of iron, steel, or stainless steel, to pipe fittings of steel, stainless steel, chrome-moly steel, or cast and malleable iron each of which shall be marked with the English name of the country of origin by means of die stampinq, cast-in-mold lettering, etching, or engraving (emphasis added).

We are of the opinion that the recent amendment would not effect the outcome in *Midwood*. The new law states only that no exception may be made under subsection (a)(3) of this section, i.e. 19 U.S.C. 1304(a)(3).[1] It does not alter the statutory requirement that the imported article be marked to indicate the country of origin *to the ultimate purchaser*. In *Midwood*, the Court did not apply an (a)(3) exception to reach the conclusion that the marking on the outer edge of the forging was sufficient. It based its determination on the

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[1] This provision allows the Secretary of the Treasury in particular circumstances to authorize an exception from the requirements of marking. For example, 19 U.S.C. 1304(a)(3)(D) states that an exception may be authorized if the marking of the container will reasonably indicate the origin; (a)(3)(H) states that an exception may be authorized if an ultimate purchaser, by reason of the character of such article or by reason of the circumstances of its importation, must necessarily know the country of origin of such article even though it is not marked to indicate its origin.

finding that the manufacturer rather than the consumer was the ultimate purchaser of the imported articles. Therefore, the case is still controlling.

Based on *Midwood*, we conclude that the marking of the forgings on their outer edge is sufficient provided that such marking is legible and conspicuous.

II

Section 304 of the Tariff Act of 1930, as amended (19 U.S.C 1304), requires that every article of foreign origin be marked *leqibly*, permanently, and *conspicuously* to indicate the name of the country of origin to the ultimate purchaser in the United States (emphasis added). Section 134.41(b) of the Customs Regulations (19 CFR 134.41(b)) interprets these requirements to mean that the ultimate purchaser in the United States must be able to find the marking easily and read it without strain.

In this case, four representative sample forgings were submitted. Each one is die-stamped "JAPAN" in letters measuring approximately 1/16 inches tall marked near an outer edge. The samples include three 90 degree elbows (the outer diameters measuring 1-5/16 inches; 2-3/8 inches; and 2-7/16 inches) and one tee (2-3/8 inches outer diameter). The elbows have a fairly smooth dark finish whereas the finish on the tee is lighter and rougher.

We find that the placement of the country of origin marking at the edge of each of the samples is conspicuous. This is the same location of the country of origin marking on the forgings in *Midwood* which the court approved.

Counsel argues that legibility cannot be an issue in connection with imports by an ultimate purchaser if the underlying intent of the marking statute (*i.e.* to inform an ultimate purchaser of origin) is given proper consideration. In the alternative, counsel argues that if legibly marking is required, the standard of legibility should be relaxed. The basis for this argument is that importer/ultimate purchaser of the forgings would be more discerninq of country of origin markings than an ordinary purchaser.

We disagree with counsel's contention that legibility cannot be at-issue here. Section 19 U.S.C. 1304(a) requires legible marking and no exceptions are authorized. Therefore, *where an article is required to be marked*, such marking must be legible. As a practical matter, legibility is not usually an issue where the importer is the ultimate purchaser because in such cases an *exception from marking* is often applicable. In the case of the subject merchandise, however, the new law permits no exceptions from marking. This includes situations where the importer is the ultimate purchaser. Accordingly, we conclude that the country of origin marking must be legible.

We also do not agree with counsel's suggestion that legibility standards should be less strict in cases where the importer is the ultimate purchaser. As indicated above, the basic test to determine legibility is whether the ultimate purchaser can read the country of origin marking without strain. If any lesser standard was applied, the legibility requirement would be meaningless.

Upon examination of the samples, we find that only two of the samples (the tee and the largest elbow) are legibly marked with the country of origin. Both of these items are marked with distinct, well-formed letters. In addition, the letters on the tee are somewhat larger that the letters on the other samples. We believe that the ultimate purchaser would be able to read the country of origin on both these articles without strain. This is not true in the case of the two smaller elbows. Although these articles are marked in the same size letters as the largest elbow, the letters are not as distinct or well-formed. They readily blend in with the background and are hard to decipher. They cannot be considered legible.

Holding:

1. The imported forgings may be marked with the country of origin on an outer edge of the forging even though the marking will be obliterated during further manufacture.
2. Two of the submitted samples, the tee and the largest elbow are legibly marked with the country of origin within the meaning of section 1304 and 19 CFR 134.41(b). The other two samples are not.

DONALD W. LEWIS,
Director,
Entry Procedures and Penalties Division.

[ATTACHMENT D]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, May 11, 1987.
MAR 2-05 CO:R:E:E 730416 km

MR. J. A. BAMBERGER
LADISH CO., INC.
Cudahy, WI 53110

DEAR MR. BAMBERGER:

This is in response to your request for a ruling regarding the country of origin marking requirements applicable to imported forgings.

The imported items are solid forgings used in the manufacture of socket weld and threaded pipe fittings. They are imported under TSUS items 606.71 and 606.73 and are subject to the mandatory marking provisions of section 207 of the Tariff and Trade Act of 1984, as amended (19 U.S.C. 1304(c)). In the U.S., the imported forgings are subjected to processing which includes machining, drilling the waterways, and either threading or machining for socket welding. You have asked whether these machining and finishing operations constitute substantial transformation, and if so, whether the country of origin marking need not survive, or be replaced after, such processing.

We are of the opinion that the above-described machining and finishing constitutes a substantial transformation of the solid forgings into new and different articles of commerce, finished pipe fittings. The U.S. processor is therefore deemed to be the ultimate purchaser. Accordingly, the imported items must only reach the processor properly marked and need not be marked to survive, or be remarked after, such processing.

For a more detailed explanation of the mandatory marking requirements as they apply to the issue of substantial transformation, you may reference the attached ruling, 729819 km.

STEVEN I. PINTER,
Chief,
Entry, Licensing and Restricted Merchandise Branch.

[ATTACHMENT E]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, December 17, 1992.
MAR 2-05 CO:R:C:V 734673 LR
Category: Marking

MR. PATRICK H. GRAY GENERAL MANAGER
UNI-FLANGE
5285 Ramona Blvd.
Jacksonville, FL 32205

Re: Country of origin marking; cast iron flanges and fittings; machining; drilling; grinding; assembly; pipe fitting; substantial transformation.

DEAR MR. GRAY:

This is in response to your letter dated May 28, 1992, regarding the country of origin marking of imported ductile iron adapter flanges.

Facts:

Ductile Iron Adapter Flange as described on commercial invoice as "Series 900, 1300 or 1350".

You import two rough castings for each complete unit. Each casting is placed on a special grinding fixture and the mating surfaces are ground smooth. The castings then move to a

three part drilling station, where three bolt holes are drilled in each casting. After this drilling, domestic galvanized fasteners are placed in the bolt holes, joining the two halves together. The assembled "unit" then goes to the cutting lathe, where two machining functions are performed. First, a machine cut is performed to bring the inside surface to a totally smooth, cylindrical shape. Next, a special serrating tool is inserted into the lathe and the unit receives a series of machine serrations, to exacting standards, on its inside surface. After 100% gauging, the unit it epoxy coated. Additional connecting hardware (domestic) is added. Ductile Iron Adapter Flange as described on commercial invoice as "Series 200/400/420"

A rough, one piece ductile iron casting is imported. This casting is then placed on a lathe and the outside surface (rim) is machined smooth, followed by the face of the casting. Set screw holes are then drilled and tapped around the perimeter of the casting. Depending on the size, the amount of set screw holes can range from 2 to 48. The casting is then placed on a special drilling fixture/template, and both holes are in the face of the case. Domestic set screws are then installed and the casting is epoxy coated.

You contend that the above-described products are excepted from country of origin marking by virtue of the substantial machining, fabrication, finishing, and assembly functions that are performed on each item; however, you intend to mark all containers.

Issue:

Whether the castings which are processed in the manner described above, may be marked with the country of origin on the container in lieu of the article itself.

Law and Analysis:

Section 304 of the Tariff Act of 1930, as amended (19 U.S.C. 1304), requires, subject to certain specified exceptions, that every article of foreign origin imported into the U.S. shall be marked to indicate the country of origin to the ultimate purchaser in the U.S. Part 134, Customs Regulations (19 CFR part 134), implements the country of origin marking requirements and exceptions of 19 U.S.C. 1304. An ultimate purchaser is defined in section 134.1, Customs Regulations (19 CFR 134.1), as "the last person in the U.S. who will receive the article in the form in which it was imported." The regulation further provides that if an imported article will be used manufacture, the manufacturer may be the ultimate purchaser if he subjects the imported article to a process which results in a substantial transformation. However, if the manufacturing process is merely a minor one which leaves the identity of the imported article intact,19 CFR 134.1(d)(2) provides that the consumer or user of the article, who obtains the article after the processing will be regarded as the ultimate purchaser.

According to United States v. Gibson-Thomsen Company, Inc., 27 CCPA 267 (C.A.D.98), a U.S. manufacturer is considered to be an ultimate purchaser if a manufacturing process is performed on an imported item so that the item is substantially transformed in that it loses its identity and becomes an integral part of a new article will a new name, character or use. The court determined that in such circumstances, the imported article is excepted from individual marking. Only the outermost container is required to be marked. See 19 U.S.C. 1304(a)(3)(D), section 134.32(d) and 134.35, Customs regulations (19 CFR 134.32(d), 134.35).

In Midwood Industries v. United States, 64 Cust. Ct. 499, C.D. 4026, 313 F. Supp. 951 (1970), the Customs Court considered the effect of U.S. processing on the country of origin marking requirements of imported steel forgings. Although the edges of the forgings were legibly and conspicuously marked with the country of origin at the tie of importation, the country of origin marking was obliterated or destroyed during the course of the domestic processing. The processes involved in finishing the imported articles included, cutting, boring, facing, spotfacing, drilling tapering, threading, bevelling, heating and compressing. The court found that the marking was sufficient because the processing substantially transformed the imported forgings into fittings and flanges. As such, the court found the U.S. processor was the ultimate purchaser of the imported merchandise and that the removal of the marking during processing was acceptable.

Although the court based its decision in part on the fact that the processing changed a producer's forgings to a consumer's flange, the decision makes clear the numerous machining operations were performed in the U.S. which imparted essential characteristics to the forgings that enabled them to be used as fittings and flanges. For example, there was testimony that the rough forgings have no connecting ends and therefore, cannot be used to connect pipes of matching size, the essential purpose of fittings.

In T.D. 87–46, Customs determined that threading operations alone do not substantially transform pipe fittings so as to change their country of origin. Customs found that threading does not change the name, character or use of a fittings, and that the operation is insubstantial in relation to the nature of the operations needed to manufacture a fitting. In C.S.D. 89–121, July 25, 1989, Customs construed Midwood as requiring that significant machining operations which change the actual dimensions of imported forgings into those of the finished article must be undertaken before a finding of substantial transformation may be reached. Operations such as lathing, drilling and grinding, which changed the fundamental character of the imported articles were distinguished from cosmetic or minor processing operations such as identification marking, and blasting, tumbling and plating. See also HRL 732883, August 1, 1990 (extensive U.S. machining operations of imported cast iron components of pipe fittings constituted a substantial transformation).

In this case, the machining operations that are performed on the imported articles described as "ductile iron adapter flanges series 900, 1300 or 1350" are similar to those involved in Midwood. As in Midwood, the castings are imported in a rough condition with a significant amount of machining to be done to enable them to be used as flanges. While the imported castings resemble the size and shape of the finished articles, they are not yet machined to the actual dimensions. In order to achieve the shape and dimensional requirements, they are subjected to numerous machining operations and assembly which change the fundamental character of the imported articles from castings to flanges.

We find that such processing, which involves lathing, grinding and drilling, coupled with assembly, constitutes more than minor machining operations and substantially transforms the imported castings into articles with a new name, character or use. As such, we find that the U.S. processing constitutes a substantial transformation and, for this reason, the U.S. manufacturer is the ultimate purchaser.

Although in these circumstances, the imported articles would ordinarily be excepted from individual marking pursuant to 19 U.S.C. 1304(a)(3)(D), 19 CFR 134.32(d) and 19 CFR 134.35, this is not the case with respect to imported iron and steel pipe fittings. In this regard, 19 U.S.C. 1304(c) provides that, with two exceptions not applicable here, no exception from marking may be made under subsection (a)(3) of this section with respect to pipes of iron, steel or stainless steel, to pipe fittings of steel, stainless steel, chrome-moly steel, or case and malleable iron each of which shall be marked with the country of origin by means of die stamping, cast-in-mild lettering, etching, or engraving.

Therefore, if the imported articles are classifiable as pipe fittings, they must be marked in accordance with the requirements of 19 U.S.C. 1304(c). However, in view of the fact that the importer is the ultimate purchaser, the marking may appear in a location where it will be obliterated during the U.S. processing. See HQ 728693, November 5, 1985.

With respect to the imported articles described as "ductile iron adapter flange series 200/400/420", less domestic processing is performed and we do not have enough information to determine whether it is enough to constitute a substantial transformation. Before and after samples, a detailed description of each process and cost information associated with the domestic processing are needed before we can make a decision regarding the marking of these articles.

Holding:

For purposes of 19 U.S.C. 1304, the domestic processing of the imported articles described as "ductile iron adapter flange series 900, 1300 or 1340" constitutes a substantial transformation and the U.S. importer/manufacturer is considered the ultimate purchaser. If these articles are classified as pipe fittings, they may be marked in a location were the country of origin marking will be obliterated during the U.S. processing. If they are not classified as pipe fittings, marking of the containers in lieu of the articles themselves is sufficient. No determination is made regarding the other imported articles.

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT F]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

MAR–2–05 RR:CR:SM 561925 MLR
Category: Marking

LAURENCE J. LASOFF, ESQ.
JOHN B. BREW, ESQ.
LAURA A. SVAT, ESQ.
COLLIER, SHANNON, RILL & SCOTT, PLLC
3050 K Street, N.W.
Suite 400
Washington, DC 20007

Re: Country of origin marking for stainless steel forgings from Italy and Germany; substantial transformation; *Midwood*; Modification of HRL 559871.

DEAR MR. LASOFF, MR. BREW, AND MS. SVAT:

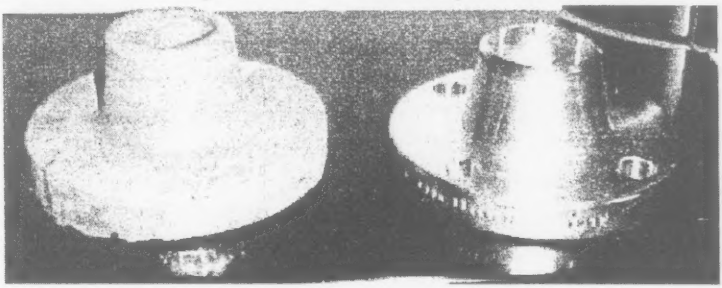
This is in reference to your letters of May 28, 1996, and March 24, 1997, requesting a ruling on behalf of your client, concerning the country of origin marking of stainless steel flanges, and requesting reconsideration of Headquarters Ruling Letter (HRL) 559871 dated February 18, 1997.

We have reviewed HRL 559871 and believe the portion pertaining to the marking of stainless steel flanges made from Italian or German forgings is incorrect. It is this aspect of the ruling that we are proposing to modify. The remainder of the ruling concerning the marking requirements of flanges made from Mexican forgings would remain in effect.

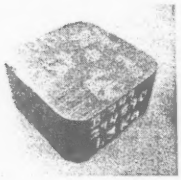
Facts:

You state that your client imports stainless steel forgings (also referred to as unfinished stainless steel flanges), classifiable under 7307.21.10, Harmonized Tariff Schedule of the United States (HTSUS), which provides for "tube or pipe fittings (for example, couplings, elbows, sleeves), or iron or steel: Other, of stainless steel: Flanges: Not machined, not tolled and not otherwise processed after forging." These forgings are imported from Mexico, Germany, and Italy into the U.S. In the U.S., the forgings are machined into stainless steel flanges, classifiable under subheading 7307.21.50, HTSUS, which provides for "Flanges: Other." The stainless steel flanges are generally manufactured using alloys such as 304/304L and 316/316L. The five general types of flanges, normally ranging in size from 2 to 30 inches, include (i) weld neck flanges (used for butt-weld line connections), (ii) threaded flanges (used for threaded line connections), (iii) slip-on and lap joint flanges (used with stub end/butt-weld line connections), (iv) socket weld flanges (used with fit pipe into machine recessions), and (v) blind flanges (used to seal off lines).

When a forging is processed into a finished stainless steel flange, the entire forging is machined, which includes machining the backside, faceside, outside diameter, and bore; and drilling the bolt holes. Samples of a billet, unfinished stainless steel flanges, and finished stainless steel flanges were submitted and are depicted below:



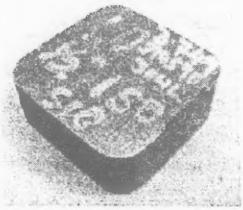
Unfinished (rough) weld neck 2″ Weld Neck



Billet for ½" 150 Weld Neck

Unfinished (rough) Weld Neck
(can only be made into ½" weld neck)

½" Weld Neck



Billet used to make rough flange and articles depiced below:

Rough flange for all articles below

½" 150 Slip On Flange | ½" 150 Threaded Flange | ½" 150 Lap Joint Flange | ½" 150 Socket Weld Flange | ½" Blind Flange

A description of the entire process for the manufacture of flanges used in the pipe, valve, and fittings industries was submitted on a CD-ROM. The description begins by showing raw billet material, which is in long square-shaped bars. The bars are precisely cut to the appropriate length and width based on the particular forging to be made (see billets depicted above). Next, the material is placed in a furnace that is heated to the required forging temperature, where via a closed-die process, stainless steel flanges are forged. The forgings are then subject to American Society for Testing Materials (ASTM) A182 solution annealing (heat treatment), and water quenching for austenitic stainless material grades. The material is machined to exact specification with the help of computer assisted design. Next, a computer programmed drill is used to drill bolt holes. The flange is marked with the company's logo, nominal pipe size, pressure class rating, material standard, grade of material, heat number, and date of manufacture. Finally, each flange is tested with an alloy verification instrument to verify the appropriate materials and manufacture.

Issue:

Whether the machining operations performed in the United States to the rough flanges (subsequent to the solution annealing operation as depicted in the facts above) constitute a substantial transformation such that the finished stainless steel flanges are not subject to the marking requirements of 19 U.S.C. 1304.

Law and Analysis:

The marking statute, section 304, Tariff Act of 1930, as amended (19 U.S.C. 1304), provides that, unless excepted, every article of foreign origin (or its container) imported into the U.S. shall be marked in a conspicuous place as legibly, indelibly and permanently as the

nature of the article (or its container) will permit, in such a manner as to indicate to the ultimate purchaser in the U.S. the English name of the country of origin of the article. Part 134, Customs Regulations (19 CFR Part 134) implements the country of origin marking requirements and exceptions of 19 U.S.C. 1304.

In regard to the stainless steel flanges forgings imported from non-NAFTA countries that are finished into flanges in the U.S., you contend that the finished flanges are not being marked with their country of origin as required by U.S. law. In order for the country of origin of the flanges to be considered the U.S., the work or material added to the forgings in the U.S. must effect a substantial transformation. 19 CFR 134.1(b).

For country of origin marking purposes, a substantial transformation of an imported article occurs when it is used in the U.S. in manufacture, which results in an article having a name, character, or use differing from that of the imported article. In such circumstances, the manufacturer or processor in the U.S. who converts or combines the imported article into the different article will be considered the "ultimate purchaser" of the imported article, and the article is excepted from marking and only the outermost container is required to be marked. *See* 19 CFR 134.1.

You contend that imported forgings are not substantially transformed in the U.S. when they are machined and made into flanges in the U.S. In *Midwood Industries, Inc. v. United States*, 64 Cust. Ct. 499, 313 F. Supp. 951 (1970), imported flange forgings, conforming to ASTM standards, were subjected to several processes by the U.S. importer/processor. Excess material was removed from the rim, and the forgings were faced, bored, threaded or beveled, and drilled and spotfaced. In certain instances, the flanges were subject to both heating and reducing one end in size and diameter by compression. In accordance with American Standards Association (ASA), the flanges were marked with the manufacturer's trade name, grade of steel, and wall thickness or pressure rating and size. In some instances, the flanges were subjected to chemical baths that cleaned and coated them with a phosphate solution. Sometimes, a final heat treatment and a rustproof coating were performed, or the flanges were painted or subjected to strictly cosmetic operations.

The court noted that the imported forgings were made as close as possible to the dimensions of the ultimate finished form. The court heard testimony that the forgings had no connecting ends allowing them to connect pipes together, and that they were often sold to machine shops. The court stated that the products remained forgings unless and until converted by some manufacturer from producers' goods into consumers' goods, that is, flanges and fittings. The court stated that the imported forgings, and the fittings and flanges made therefrom were different articles of commerce in a tariff sense. As the processes performed on the forgings were manufacturing processes, albeit processes that were representative of a successive stage of manufacture, the court held that the importer/processor was the ultimate purchaser of the forgings.

You claim that *Midwood* no longer reflects the state of the law as subsequently decided by the court and should not form the basis for our decision in this case. Moreover, it is noted that under the NAFTA Marking Rules, the processes performed are not sufficient to render the flange a product of the U.S. You believe that the same result obtained under the NAFTA Marking Rules should be obtained when the forging is a product of a non-NAFTA country.

The question to be resolved is whether *Midwood* is still applicable to the facts presented. The issue of substantial transformation in this case must be decided in accordance with the facts presented applying the reasoning employed by the court in a number of decisions in this area, namely whether a change in name, character, and use has occurred. *See Uniroyal Inc. v. United States*, 542 F. Supp.1026 (CIT 1982), *aff'd*, 702 F.2d 1022 (Fed. Cir.1983), *National Hand Tool v. United States*,16 CIT 308, (1992), *aff'd*, 989 F.2d 1201 (Fed. Cir. 1993); *Superior Wire v. United States*, 669 F. Supp. 472 (CIT 1987); *affd*, 867 F.2d 1409 (Fed. Cir.1989); *National Juice Products Ass'n v. United States*, 628 F. Supp. 978 (CIT 1986); *Ferrostaal Metals Corp. v. United States*, 664 F. Supp. 535 (CIT 1987).

In *Superior Wire*, the court stated that it was focusing on past precedent and primarily on those cases involving processing of metal objects without combination or assembly operations, noting that cases dealing with substantial transformations are very product specific. 669 F. Supp. at 479. Accordingly, a similar analysis of court decisions would seem to be appropriate with regard to this case.

1. Name

With respect to a change in name, it is stated that "stainless steel forgings" or "unfinished stainless steel flanges" are imported. While not addressing a change in name in par-

ticular detail but rather focusing on the manufacturing processes performed, the court in *Midwood* noted that the imported articles were variously described as "forgings," "unfinished flange forgings," "flange in the rough," or semi-finished articles." 313 F. Supp. at 956. Subsequent to the *Midwood* decision, numerous decisions have determined that a change in name by itself is the least persuasive factor and is insufficient by itself to support a holding that there is a substantial transformation. *See Sunerior Wire v. United States*, 867 F.2d 1409, 1414 ("this is the least persuasive factor and is insufficient by itself to support a holding that there is a substantial transformation"); *United States v. International Paint Co.*, 35 C.C.P.A. 87, 93–94 (1948) ("a change of name alone would not necessarily result in a product being regarded as 'manufactured or produced'"); *National Juice Products Ass'n*, 628 F. Supp. at 989 ("in applying the 'name, character or use' test, courts have focused primarily on changes in use or character of the item, turning to various subsidiary tests depending on the situation"). Accordingly, the evidence of any change in name is equivocal absent further evidence regarding character and use changes. Nonetheless, we note that while the title of ASTM A182 standard specification is "Forged or rolled-alloy steel pipe *flanges*," in several sections the stainless steels that are melted and forged are referred to as "*forgings*." (Emphasis added.)

2. Character:

With respect to a change in character, we note that based on the ASTM A182 standard specification, the character of the flanges is imparted by the chemical composition of the steel[1], mechanical properties[2], and heat treatment[3] at the time the forging is made. In fact, the physical and chemical properties must be present in the forging before a finished flange can be produced. ASTM A182 is applied to the manufacture and testing of forgings which will be finished into flanges, etc.

a. Chemical Composition

In this case, the imported articles are stated to be either Type 304/304L or 316/316L alloys. Table 2 of ASTM A182 indicates that the composition of the Type 304 and 316 alloys is composed of specific percentages of chromium, nickel, carbon, etc. Type 304, in the austenitic stainless steel family, has lower carbon for better corrosion resistance in weld fabrication, and in Type 304L the carbon is reduced even further. "Design Guidelines for the Selection and Use of Stainless Steel," Specialty Steel Industry of North America (1995). Type 316 contains molybdenum to increase corrosion resistance, and Type 316L is carbon reduced for welding. Type 304 withstands ordinary rusting in architecture, and is resistant to food processing environments, organic chemical, dyestuffs, and a wide variety of inorganic chemicals. Type 304L resists nitric acid and sulfuric acids at moderate temperature and concentrations and is used for storage of liquefied gases and waste-water treatment. Type 316 is useful in chloride environments that tend to cause pitting. *Id.; see also* www.meritbrass.com/faq.htm. Austenitic stainless steels yield strengths between 30 and 200 ksi, depending on composition and amount of cold work. "Design Guidelines", *supra.*

Subsequent to *Midwood*, the court in *Superior Wire* noted that the composition of the wire rod determines what uses the wire may have, and, therefore, no substantial transformation was found. 669 F. Supp. 472. In *National Hand Tool*, the components were subjected to heat treatment which changed the microstructure of the material, but the fact that there was no change in the chemical composition of the material appears to have been relevant in finding no substantial transformation.

b. Mechanical Properties & Heat Treatment

Regarding the mechanical properties, A182 requires the stainless steels of specific chemical requirements to be melted by certain processes, and that the "material shall forged as close as practicable to the specified shape and size." The specification also states that "except for flanges of any type," forged bar may be used without additional hot working. After hot working, the forgings are to be cooled prior to heat treating such as anneal-

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[1] *See* Section 6 of ASTM A–182 entitled 4Chemical Composition" that requires the steel to conform to the requirements as to chemical composition for the grade ordered as set forth in Table 2 of the specification, which lists "Chemical Requirements."

[2] *See* Section 7 of ASTM A–182 entitled "Mechanical Properties" that requires the material to conform to the mechanical properties for the grade ordered as set forth in Table 3 of the specification, which lists "Tensile and Hardness Requirements."

[3] *See* Section 5 of ASTM A–182 entitled "Heat Treatment" that states after hot working, forgings shall be cooled prior to heat treating in accordance with the requirements of Table 1 which lists "Heat Treating Requirements."

ing, normalizing and tempering. Testing to determine the mechanical properties of tensile strength and hardness limits is then performed on the production forgings. Therefore, it is the closed-die forging and heat treating processes that fix the performance characteristics of the metal.

The metallurgical characteristics of strength and ductility and the processes that give the article those characteristics, annealing and galvanizing, were deemed to be important in *Ferrostaal* as significantly affecting the character of the steel by dedicating it to uses compatible with its strength and ductility. 664 F. Supp. at 5640. Here, no evidence has been presented to show that the treatment of the forging in the U.S. substantially changes the metallurgical properties that are imparted by the forged alloys. As the specification indicates, the forgings must be in dimensions that are close to their finished form, and after heat treatment the forging must meet certain tensile and hardness requirements. If the forgings fail these criteria, they cannot be used for finishing into flanges.

Accordingly, we find that the performance characteristics of the finished flanges in this case are mainly imparted by the choice of alloy, the forging process, and the heat treatment performed before importation.

One aspect deemed important in *Midwood* was the manufacturing processes performed. However, we find that under subsequent cases, operations like those performed here were not considered sufficient to be a substantial transformation. As in this case, the production of the cold drawn wire in *Superior Wire* started with taking raw materials, such as scrap metal, to produce steel billet. The steel billet of specified composition was heated and rolled into the rod of final form. In this case, the forging is also produced from steel billet that is used to make the forgings at issue. Additionally, in *National Hand Tool*, the imported components were either hot-forged or cold-formed into their final shape (except the speeder handles which were bent), and no substantial transformation was found.

In *Superior Wire*, after the billet was used to make the rod, the rod was drawn up to three times in order to reduce the rod to a wire of a specific size. Accordingly, despite the repeated drawing to bring the wire rod into its final wire dimension, a reduction resizing process which does not occur in this case, the court found that there was no substantial transformation. In *National Hand Tool*, the hand tool components were knurled, heat treated, sand-blasted, tumbled or chemically vibrated, and electroplated with nickel and chrome to resist rust and corrosion. Despite the fact that the heat treatment brought the components to ANSI specifications and one particular component could be used to make two different tools, the court in *National Hand Tool* determined that there was no substantial transformation. Therefore, *Superior Wire* and *National Hand Tool*, decided after *Midwood*, did not find the manufacturing processes considered in those cases, which are analogous to the processes performed on the forgings in this case, to result in a substantial transformation. In *Ferrostaal*, while the issue did not center on machining operations, the court focused on the annealing and galvanizing process that transformed the chemical composition, strength and ductility of the sheet, and, therefore, the character of the steel. The heat treatment in this case is performed prior to importation and also is important in imparting tensile strength and hardness requirements.[4]

In *Midwood*, the court found that the "manufacturing" processes resulted in a substantial transformation, "[a]lbeit * * * representative of a successive stage of manufacture." 313 F. Supp. 957. Subsequent to *Midwood*, however, the court in *Superior Wire* found no substantial transformation, in part, because the "wire rod and wire may be viewed as different stages of the same product." 669 F. Supp. at 479. Accordingly, in light of the court decisions concerning metal articles subsequent to *Midwood*, under these particular circumstances with respect to the physical and chemical properties of the forgings, it is our opinion that the character of the forgings is not changed by the machining operations. The metallurgical characteristics are primarily dictated by the alloy used, the forging process, and the heat treatment. The size of the forging also cannot be changed significantly when it is machined into a finished flange, to allow it to fit various sizes of pipe. Therefore, the size of the forging dictates the size of the pipe to which it may be connected. The size of the

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[4] The only case which lends support to the finding of a substantial transformation in this case is *Torrington Co. v. United States*, 596 F. Supp. 1083 (1984); *aff'd*, 764 F. 2d 1563 (1985). In *Torrington*, a wire (made from an alloy suitable for the wire to be made into needles) was straightened, cut, beveled, and drawn to form a needle blank. The needle blank was only useful in the needle-making process. The processes of striking an eye in the blank, making a groove for thread, and hardening, sharpening, and polishing were also determined to be a transformation from producers' to consumers' goods. *Torrington*, 764 F.2d at 1571. However, unlike this case, the statute governing the decision was the Generalized System of Preferences (GSP).

pipe, in turn, dictates the number of drill holes to be made in the forging so that there is a tight connection. Therefore, since the forging dictates the size of pipe to which it may be connected, and a certain number of drill holes are needed to assure a tight connection depending on the size of the pipe, boring more or less holes during machining will not allow a forging to fit a different sized pipe. While the type of machining to the bore may have some influence on whether the flange will become a lap joint flange, slip-on flange, or threaded flange, this again is primarily dictated by the pipe to which it will be connected and the uses of that pipe. The particular way the flange is to be joined to the pipe, whether by threading or welding, for example, may also have some influence on the pressure to which the application may be subjected, but this mechanical property appears to be imparted in large part before importation into the U.S. The machining operations also do not extensively change the shape of the forging, but only adjust the tolerances, allowing the flange to conform to specification. Indeed, primary consideration in establishing pressure-temperature ratings set forth in ASME B16.5 which addresses the dimensional standard specifications of pipe flanges, appears to be the wall thickness and the material properties which are primarily established before importation. Finally, the final testing of the flange involves confirming that the proper metallurgical properties are present. Therefore, it is our opinion that while the machining may result in the exacting specifications for use as a slip-on, threaded, or other flange, the change from the machining is primarily only a change in the surface or finished characteristics of the flange, because the character of the imported forging remains the same. *See* National Hand Tool (although the heating process changes the microstructure of the material which may amount to changes in the characteristics of the material, there is no change in character.)

3. Use

Regarding a change in use, the imported articles are intended for a particular use, namely as flanges, and, in fact, are normally only intended to be connected to certain pipe sizes, except for certain blind flanges. While the court in *Midwood* heard testimony that the imported articles could not be used for any purpose in their imported state, the same would hold true for numerous articles, including the imported hand tool components in *National Hand Tool*, or the wire rod in *Superior Wire*. In *Superior Wire*, the court found that the end use of wire rod is generally known before the rolling stage and the specifications are frequently determined by reference to the end product for which the drawn wire will be used. 867 F.2d 1414. The court found that wire rod has few uses except for making wire, and hence, no substantial transformation was found. *National Hand Tool* did state that a predetermined use would not necessarily preclude the finding of a substantial transformation, but the court only cited to *Torrington Co. v. United States*, 596 F. Supp. 1083 (1984); *aff'd*, 764 F. 2d 1563 (1985), which was a case that pertained to the more liberal interpretation of substantial transformation under the Generalized System of Preferences.[5] Accordingly, the fact that the forging could be made into a slip-on flange, threaded flange etc. does not seem to be relevant to finding a change in use for purposes of finding a substantial transformation for country of origin marking.

Regarding the producer and consumer good distinction, relied upon in *Midwood*, the court in *Superior Wire* stated that "[t]he producer to consumer goods distinction drawn in *Midwood*, a marking case, however, was found not determinative as to substantial transformation in shoe construction in another marking case, *Uniroyal*." 669 F. Supp. 479. In *Superior Wire*, the court found no clear change from producers' to consumers' goods because the wire rod was primarily intended for wire production, which was intended for use for making wire mesh for concrete pipe reinforcement. As in *Superior Wire*, the wire rod could not be hot-rolled to a sufficiently round state to meet specifications of wire, just as the forging here is unable to be used to connect pipe absent the dimension and tolerance requirements of the ASME B16.5 "Pipe Flanges & Flanged Fittings" standard are performed. Accordingly, we find no change in use.

Finally, several court decisions discuss "cross-checks" which involve the use of other information, such as value added, to determine whether there is a substantial transformation. In this case, cost figures were submitted showing the forging cost and the machining cost for a stainless steel weld neck and stainless steel slip-on using 316 alloy. The cost of machining adds approximately 11 percent in value to a 10 inch weld neck forging, and 18 percent for a four inch slip-on forging. According to *Superior Wire* and *Ferrostaal*, value

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[5] The court in *Torrington* indicated it was "keeping in mind the GSP's fundamental purpose of fostering industrialization" in making a substantial transformation decision. 764 F.2d at 1571; *see also Superior Wire*, 669 F. Supp at 477.

was examined to aid as a cross-check in determining the country of origin. A 15 percent value added did not aid or detract from a finding of substantial transformation in *Superior Wire*, and in *Ferrostaal* the value ranged from 36 to 50 percent. In *Torrington*, at least 35 percent was added. Accordingly, we find that the value added by the machining in this case does not aid in finding a substantial transformation, as the court found in *Superior Wire*.

Since we do not find a change in name, character, and use, it is our opinion that the importer/U.S. processor is not the ultimate purchaser. Therefore, we find that the steel flanges processed from forgings of Italian or German origin, as described above, will be required to be marked with the country of origin of the forging.

Holding:

Based upon the information provided, for the forgings imported from Mexico, pursuant to 19 CFR 102.18(b)(1)(iii), the country of origin of the finished stainless steel flanges is the country of origin of the forging, which is Mexico. For the forgings imported from Italy or Germany, the ultimate purchaser of the forgings is the recipient of the steel flanges. Accordingly, steel flanges processed from forgings of Italian or German origin, as described above, will be required to be marked with the country of origin of the imported forging. Consistent with this ruling, we propose to modify HRL 559871 dated February 18, 1997.

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT G]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

MAR–2–05 RR:CR:SM 561927 MLR
Category: Marking

PORT DIRECTOR OF CUSTOMS
610 S. Canal Street
Chicago, IL 60607–4523

Re: Country of origin marking of elbows; substantial transformation; *Midwood* Revocation of HRL 700022.

DEAR PORT DIRECTOR:

This is in reference to Headquarters Rulings Letter (HRL) 700022 dated October 27, 1972, which was issued to your office regarding the country of origin marking of certain elbow fittings imported by Weldbend Corporation ("Weldbend").

We have reviewed HRL 700022 and believe that the holding therein is incorrect. For the reasons set forth below, this ruling proposes to revoke HRL 700022.

Facts:

A shipment of unfinished welding fittings was imported at the port of Chicago under entry No. XXXXXX, dated November 17, 1971. Your office enclosed copies of the complete file on this matter. The invoice described the goods as "'Siekmann' Seamless Carbon Steel Welding Fittings to ASA [American Standards Association] B 16.9 and ASTM [American Society for Testing Materials] A–234, WPB, unmachined and unmarked, only die-stamped with 'Germany' on the edge of each elbow, size of letters about ca. 2mm." Each imported elbow was die stamped "Germany" on the extreme end, which was machined off in the process of finishing the elbow. The containers of the imported elbow forgings were marked to indicate the country of origin of the elbows.

The file contains a letter dated August 1, 1972, from Weldbend, stating that Weldbend received the forgings in question from the importer in the original packaged form and that Weldbend processed the forgings to make finished elbows. The processing involved beveling, painting, and marking the elbows with the name "Weldbend," but not with the country of origin of the forgings, which was Germany.

Issue:

What are the country of origin marking requirements applicable to the finished elbows?

Law and Analysis:

The marking statute, section 304, Tariff Act of 1930, as amended (19 U.S.C. 1304), provides that, unless excepted, every article of foreign origin (or its container) imported into the U.S. shall be marked in a conspicuous place as legibly, indelibly and permanently as the nature of the article (or its container) will permit, in such a manner as to indicate to the ultimate purchaser in the U.S. the English name of the country of origin of the article.

Part 134, Customs Regulations (19 CFR Part 134) implements the country of origin marking requirements and exceptions of 19 U.S.C. 1304. In order for the country of origin of imported articles to be considered the U.S., and excepted from marking, the work or material added to the articles in the U.S. must effect a substantial transformation. 19 CFR 134.1(b).

For country of origin marking purposes, a substantial transformation of an imported article occurs when it is used in the U.S. in manufacture which results in an article having a name, character, or use differing from that of the imported article. In such circumstances, the manufacturer or processor in the U.S. who converts or combines the imported article into the different article will be considered the "ultimate purchaser" of the imported article, and the article is excepted from marking and only the outermost container is required to be marked. *See* 19 CFR 134.1.

In *Midwood Industries, Inc. v. United States*, 64 Cust. Ct. 499, 313 F. Supp. 951 (1970), welding fittings were imported and excess material was trimmed away from the ends, the ends were bored, tapered and beveled, die lines and other surface imperfections were removed, and the fittings were cleaned for the removal of oxidation and mill scale from the outer surface. The court heard evidence that the various processes to which the imported fittings were subjected, allowed them to conform to the standards reflected in specifications established by the ASA. The materials in the imported forgings conformed to standards established by the ASTM.

The court noted that the imported forgings were made as close as possible to the dimensions of the ultimate finished form. The court heard testimony that the forgings had no connecting ends allowing them to connect pipes together, and that they were often sold to machine shops. The court stated that the products remained forgings unless and until converted by some manufacturer from producers' goods into consumers' goods, that is, flanges and fittings. The court stated that the imported forgings, and the fittings and flanges made therefrom were different articles of commerce in a tariff sense. As the processes were manufacturing processes, albeit processes that were representative of a successive stage of manufacture, the court held that the importer/processor was the ultimate purchaser of the forgings.

In HRL 700022, Customs stated that the evidence seemed to be sufficient to indicate that the imported forgings were finished by finishing processes substantially similar to those involved in *Midwood*, and determined that the U.S. processing resulted in a substantial transformation. Thus, it was determined that the U.S. processor (Weldbend) was the ultimate purchaser of the imported forgings.

The question to be resolved is whether *Midwood* is still applicable to the facts presented. The issue of substantial transformation in this case must be decided in accordance with the facts presented applying the reasoning employed by the court in a number of decisions in this area, namely whether a change in name, character, and use has occurred. *See Uniroyal Inc. v. United States*, 542 F. Supp. 1026 (CIT 1982), *aff'd*, 702 F.2d 1022 (Fed. Cir. 1983), *National Hand Tool v. United States*, 16 CIT 308, (1992), *aff'd*, 989 F.2d 1201 (Fed. Cir. 1993); *Superior Wire v. United States*, 669 F. Supp. 472 (CIT 1987); *aff'd*, 867 F.2d 1409 (Fed. Cir. 1989); *National Juice Products Ass'n v. United States*, 628 F. Supp. 978 (CIT 1986); *Ferrostaal Metals Corp. v. United States*, 664 F. Supp. 535 (CIT 1987).

In *Superior Wire*, the court stated that it was focusing on past precedent and primarily on those cases involving processing of metal objects without combination or assembly operations, noting that cases dealing with substantial transformations are very product specific. 669 F. Supp. at 479. Accordingly, a similar analysis of court decisions would seem to be appropriate with regard to this case.

1. Name

With respect to a change in name, we note in this case that the imported articles are variously referred to as "forgings" or as "unfinished welding fittings." The invoice, itself,

describes the imported articles as "seamless carbon steel welding fittings." This is also confirmed in *Midwood*, where the imported articles were referred to as "unfinished flange forgings," "unfinished 180 degree elbow," "flange in the rough," or as "semi-finished articles." Subsequent to the *Midwood* decision, numerous decisions have determined that a change in name by itself is the least persuasive factor and is insufficient by itself to support a holding that there is a substantial transformation. *See Superior Wire v. United States*, 867 F.2d 1409, 1414 ("this is the least persuasive factor and is insufficient by itself to support a holding that there is a substantial transformation"); *United States v. International Paint Co.*, 35 C.C.P.A. 87, 93–94 (1948) ("a change of name alone would not necessarily result in a product being regarded as 'manufactured or produced'"); *National Juice Products Ass'n*, 628 F. Supp. at 989 ("in applying the 'name, character or use' test, courts have focused primarily on changes in use or character of the item, turning to various subsidiary tests depending on the situation"). Accordingly, the evidence of any change in name is equivocal absent further evidence regarding character and use changes.

2. Character

With respect to a change in character, we note that the imported articles conform to ASA B16.9 and ASTM A 234. We note that the ASA specifications are also known as "ASME" (American Society of Mechanical Engineers) specifications. ASME B16.9 provides the overall dimensions, tolerances, ratings, testing, and markings for "Factory-Made Wrought Steel Butt Welding Fittings." ASTM A 234 pertains to the specifications for "Piping Fittings of Wrought Carbon Steel and Alloy Steel for Moderate and Elevated Temperatures." ASTM A 234 provides for specific chemical requirements for the material,[1] certain mechanical requirements such as tensile strength requirements,[2] and certain heat treatment[3] at the time the forging is made. ASTM A 234 provides that elbows, return bends, tees, and header tees shall not be machined directly from bar stock. Accordingly, it is apparent that the dimensions are fairly set at the time of importation, along with their ability to withstand certain temperatures and pressures. In *Midwood*, the evidence showed that it was the U.S. processing that made the fittings conform to ASA specifications. Here, the invoice indicates that they already conform to ASA B16.9 and ASTM A 234. We note that ASME B16.9 provides for "partial compliance fittings" that may not meet the dimensions, sizes, shapes, or tolerances of the standard, as it is indicated that beveling is performed in the U.S.; nonetheless, even as "partial compliance fittings", the requirements of ASTM A 234 are met which, as indicated above, provides for the important chemical and mechanical requirements of tensile strength. Testing to determine the tensile properties and hardness is also required by A 234. Accordingly, we find that the performance characteristics of the finished elbows in this case are mainly imparted by the choice of alloy, the forging process, and the heat treatment performed before importation.

Subsequent to *Midwood*, the court in *Superior Wire* noted that the composition of the wire rod determines what uses the wire may have, and, therefore, no substantial transformation was found when the wire rod was drawn into wire. 669 F. Supp. 472. The metallurgical characteristics of strength and ductility and the processes that give the article those characteristics, annealing and galvanizing, were deemed to be important in *Ferrostaal* as significantly affecting the character of the steel by dedicating it to uses compatible with its strength and ductility. 664 F. Supp. at 5640. In *National Hand Tool*, the components were subjected to heat treatment which changed the microstructure of the material, but the fact that there was no change in the chemical composition of the material appears to have been relevant in finding no substantial transformation. Here, no evidence has been presented to show that the treatment of the forging in the U.S. substantially changes the metallurgical properties that are imparted by the forged alloys.

In *Midwood*, the court found that the "manufacturing" processes resulted in a substantial transformation, "[a]lbeit * * * representative of a successive stage of manufacture." 313 F. Supp. 957. Subsequent to *Midwood*, however, in *Superior Wire*, the court found no substantial transformation, in part because the "wire rod and wire may be viewed as different stages of the same product." 669 F. Supp. at 479. Accordingly, in light of the court

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[1] *See* Section 7 of ASTM A–234 entitled "Chemical Composition", which states that the chemical composition of each cast or heat used shall be determined and shall conform to the requirements of the chemical composition for the respective materials listed in Table 1 of the specification, which lists "Chemical Requirements."

[2] *See* Section 8 of ASTM A–234 entitled "Tensile Requirements" which states that the tensile properties of the fitting material shall conform to the requirements listed in Table 2.

[3] See Section 6 of ASTM A–234 entitled "Heat Treatment."

decisions concerning metal articles subsequent to *Midwood*, under these particular circumstances with respect to the physical and chemical properties of the forgings, it is our opinion that the character of the forgings is not changed by the machining operations. The metallurgical characteristics are primarily dictated by the carbon steel used, the forging process, and the heat treatment. The size of the forging also cannot be changed significantly when it is machined into a finished elbow, to allow it to fit various diameter sizes of pipe. The beveling operation also does not extensively change the shape of the forging, but only provides a means for the end to be connected. Therefore, it is our opinion that while the machining may require exacting specifications, it primarily only changes the surface of finished characteristics of the flange, but the character of the imported welding fittings remains the same. *See* National Hand Tool (although the heating process changes the microstructure of the material which may amount to changes in the characteristics of the material, there is no change in character.)

3. Use

Regarding a change in use, the imported articles are intended for a particular use, namely as elbow fittings, and, in fact, are only intended to be connected to certain pipe sizes. While the court in *Midwood* heard testimony that the imported articles could not be used for any purpose in their imported state, the same would hold true for numerous articles, including the imported hand tool components in *National Hand Tool*, or the wire rod in *Superior Wire*. In *Superior Wire*, the court found that the end use of wire rod is generally known before the rolling stage and the specifications are frequently determined by reference to the end product for which the drawn wire will be used. 867 F.2d 1414. The court found that wire rod has few uses except for making wire, and hence, no substantial transformation was found. *National Hand Tool* did state that a predetermined use would not necessarily preclude the finding of a substantial transformation, but the court cited *Torrington Co. v. United States*, 596 F. Supp. 1083 (1984); *aff'd*, 764 F. 2d 1563 (1985), which was a more liberal interpretation of the regulations under the Generalized System of Preferences (GSP).[4]

Since we do not find a change in name, character, and use, it is our opinion that the importer/U.S. processor is not the ultimate purchaser. Therefore, we find that the elbows processed from imported foreign forgings, as described above, will be required to be marked with the country of origin of the forgings.

Holding:

Based upon the information provided, Customs finds that no substantial transformation results from the U.S. processing of the imported forgings to produce the finished elbows. Accordingly, elbows processed from imported foreign forgings, as described above, will be required to be marked with the country of origin of the imported forgings. Consistent with this ruling, we propose to modify HRL 700022 dated October 27, 1972.

JOHN DURANT,
Director,
Commercial Rulings Division.

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[4] The court in *Torrington* indicated it was "keeping in mind the GSP's fundamental purpose of fostering industrialization" in making a substantial transformation decision. 764 F.2d at 1571; *see also Superior Wire*, 669 F. Supp. at 477.

[ATTACHMENT H]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

MAR–2–05 RR:CR:SM 561928 MLR
Category: Marking

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1233 20th Street, NW., Suite 500
Washington, DC 20036

Re: Country of origin marking of pipe fittings; substantial transformation; *Midwood*; Modification of HRL 728693.

DEAR MR. BOGARD:

This is in reference to Headquarters Rulings Letter (HRL) 728693 dated November 5, 1985, which was issued to you regarding the country of origin marking requirements applicable to certain rough forged fittings imported by Tube Forgings of America, Inc.

We have reviewed HRL 728693 and believe that the portion of the ruling holding that the processing of the rough forged fittings in the United States results in a substantial transformation is incorrect. For the reasons set forth below, this ruling proposes to modify HRL 728693.

Facts:

Tube Forgings of America, Inc., imports rough forged fittings of carbon steel and further processes them into finished pipe fittings in the form of elbows or tees. The further processing includes:

(1) Shot blasting which involves cleaning the interior and exterior of the rough forgings of oxidation and mill scale;
(2) Machine beveling, boring and tapering which involves cutting of the edges of the forgings and beveling the ends to ANSI B16.9 length dimensions, and boring and tapering the inside diameters to ANSI B16.9 tolerances
(3) Grinding which involves removing surface imperfections resulting from forgings or machining processes, per ASTM A234 specifications,
(4) Die stamping;
(5) Inspecting;
(6) Painting in a dip tank with an emulsion dipping primer to impart a protective coating;
(7) and for certain elbows, hot forming prior to beveling, which involves heating the rough forging and compressing one end to reduce its size and diameter.

In HRL 728693, Customs determined that the above-described U.S. operations constitute a substantial transformation of the forgings into finished pipe fittings. Accordingly, the U.S. processor was determined to be the ultimate purchaser of the imported forgings.

Issue:

What are the country of origin marking requirements applicable to the finished pipe fittings?

Law and Analysis:

The marking statute, section 304, Tariff Act of 1930, as amended (19 U.S.C. 1304), provides that, unless excepted, every article of foreign origin (or its container) imported into the U.S. shall be marked in a conspicuous place as legibly, indelibly and permanently as the nature of the article (or its container) will permit, in such a manner as to indicate to the ultimate purchaser in the U.S. the English name of the country of origin of the article.

Part 134, Customs Regulations (19 CFR Part 134) implements the country of origin marking requirements and exceptions of 19 U.S.C. 1304. In order for the country of origin of imported articles to be considered the U.S., and excepted from marking, the work or material added to the articles in the U.S. must effect a substantial transformation. 19 CFR 134.1(b).

For country of origin marking purposes, a substantial transformation of an imported article occurs when it is used in the U.S. in manufacture which results in an article having a name, character, or use differing from that of the imported article. In such circum-

stances, the manufacturer or processor in the U.S. who converts or combines the imported article into the different article will be considered the "ultimate purchaser" of the imported article, and the article is excepted from marking and only the outermost container is required to be marked. *See* 19 CFR 134.1.

In *Midwood Industries, Inc. v. United States*, 64 Cust. Ct. 499, 313 F. Supp. 951 (1970), welding fittings were imported and excess material was trimmed away from the ends, the ends were bored, tapered and beveled, die lines and other surface imperfections were removed, and the fittings were cleaned for the removal of oxidation and mill scale from the outer surface. The court heard evidence that the various processes to which the imported fittings were subjected, allowed them to conform to the standards reflected in specifications established by the ASA. The materials in the imported forgings conformed to standards established by the ASTM.

The court noted that the imported forgings were made as close as possible to the dimensions of the ultimate finished form. The court heard testimony that the forgings had no connecting ends allowing them to connect pipes together, and that they were often sold to machine shops. The court stated that the products remained forgings unless and until converted by some manufacturer from producers' goods into consumers' goods, that is, flanges and fittings. The court stated that the imported forgings, and the fittings and flanges made therefrom were different articles of commerce in a tariff sense. As the processes were manufacturing processes, albeit processes that were representative of a successive stage of manufacture, the court held that the importer/processor was the ultimate purchaser of the forgings.

The question to be resolved is whether *Midwood* is still applicable to the facts presented. The issue of substantial transformation in this case must be decided in accordance with the facts presented applying the reasoning employed by the court in a number of decisions in this area, namely whether a change in name, character, and use has occurred. *See Uniroyal Inc. v. United States*, 542 F. Supp. 1026 (CIT 1982), *aff'd*, 702 F.2d 1022 (Fed. Cir. 1983), *National Hand Tool v. United States*, 16 CIT 308, (1992), *aff'd*, 989 F.2d 1201 (Fed. Cir. 1993); *Superior Wire v. United States*, 669 F. Supp. 472 (CIT 1987); *aff'd*, 867 F.2d 1409 (Fed. Cir. 1989); *National Juice Products Ass'n v. United States*, 628 F. Supp. 978 (CIT 1986); *Ferrostaal Metals Corp. v. United States*, 664 F. Supp. 535 (CIT 1987).

In *Superior Wire*, the court stated that it was focusing on past precedent and primarily on those cases involving processing of metal objects without combination or assembly operations, noting that cases dealing with substantial transformations are very product specific. 669 F. Supp. at 479. Accordingly, a similar analysis of court decisions would seem to be appropriate with regard to this case.

1. Name

With respect to a change in name, we note in this case that the imported articles are variously referred to as "rough forged fittings." This is also confirmed in *Midwood*, where the imported articles were referred to as "unfinished flange forgings," "unfinished 180 degree elbow," "flange in the rough," or as "semi-finished articles." Subsequent to the *Midwood* decision, numerous decisions have determined that a change in name by itself is the least persuasive factor and is insufficient by itself to support a holding that there is a substantial transformation. *See Superior Wire v. United States*, 867 F.2d 1409, 1414 ("this is the least persuasive factor and is insufficient by itself to support a holding that there is a substantial transformation"); *United States v. International Paint Co.*, 35 C.C.P.A. 87, 93–94 (1948) ("a change of name alone would not necessarily result in a product being regarded as 'manufactured or produced'"); *National Juice Products Ass'n*, 628 F. Supp. at 989 ("in applying the 'name, character or use' test, courts have focused primarily on changes in use or character of the item, turning to various subsidiary tests depending on the situation"). Accordingly, the evidence of any change in name is equivocal absent further evidence regarding character and use changes.

2. Character

With respect to a change in character, we note that the imported articles undergo shotblasting, machine beveling, boring and tapering, grinding, die stamping, inspecting, painting, and sometimes hot forming prior to beveling. "Shotblasting" is a "process of cleaning forgings by propelling metal shot at high velocity by air pressure or centrifugal force at the surface of the forgings." Forgings Industry Handbook, Forging Industry Association, 1970. "Boring" is "enlarging a hole in a metal workpiece which was made by a previous process." http://instruct1.cit.cornell.edu/courses/orie310/mfgproc/mfgprocsum-

mary.html. A "bevel" is a "chamfer"; or "the angle between two adjacent surfaces (other than 90 degrees)" and is used in describing weld end preparations. "Glossary of Valve Terms," Grove Valve and Regulator Company of Oakland, CA, 1980. "Grinding" involves removing surface irregularities and flash from forgings. *Id.* Accordingly, it is apparent that the processes affect the surfaces of the forging and refine the tolerances.

In *Midwood*, the court found that the "manufacturing" processes resulted in a substantial transformation, "[a]lbeit * * * representative of a successive stage of manufacture." 313 F. Supp. 957. Subsequent to *Midwood*, however, in *Superior Wire*, the court found no substantial transformation, in part because the "wire rod and wire may be viewed as different stages of the same product." 669 F. Supp. at 479. Accordingly, in light of the court decisions concerning metal articles subsequent to *Midwood*, under these particular circumstances with respect to the physical and chemical properties of the forgings, it is our opinion that the character of the forgings is not changed by the machining operations. The metallurgical characteristics are primarily dictated by the carbon steel used. The size of the pipe to which the elbow fitting can be connected is dictated by the size of the forging. The beveling operation also does not extensively change the shape of the forging, but only provides a means for the end to be connected.

In some instances, the forgings undergo "hot forming" which is defined as working operations such as bending, drawing, forging, piercing, pressing and heating performed above the recrystallization temperature of the metal. Metals Handbook, American Society for Metals, 8th Ed., 1961. Subsequent to *Midwood*, the court in *Ferrostaal* noted that the metallurgical characteristics of strength and ductility and the processes that give the article those characteristics, annealing and galvanizing, were deemed to be important as significantly affecting the character of the steel by dedicating it to uses compatible with its strength and ductility. 664 F. Supp. at 5640. In *National Hand Tool*, the components were subjected to heat treatment which changed the microstructure of the material, but the fact that there was no change in the chemical composition of the material appears to have been relevant in finding no substantial transformation. In *Superior Wire*, it was noted that the composition of the wire rod determines what uses the wire may have, and, therefore, no substantial transformation was found even though the rod was drawn up to three times in order to reduce the rod to a wire of a specific size. 669 F. Supp.472. In the case of the hot forming, the particular fitting is still deemed to be an "elbow" or a "tee" before and after hot forming. One end of the elbow or tee is changed by being compressed and reduced, but the majority of the forging's shape and size remains the same. As in *Superior Wire* where the repeated cold drawing of the rod into wire did not amount to a substantial transformation, we find no substantial transformation results by compressing and reducing only one end of the elbow or tee. Furthermore, we note that in *Superior Wire*, the court found that while the wire emerged rounder and stronger as a result of the drawing process, the strength characteristic was metallurgically predetermined. Similarly, for carbon steel, the amount of carbon used affects the hardening, strength, and machinability of the forging.*http://www.steelforge.com/infoservices/matoverview/mo_carbon_steel.asp*.Therefore, absent further information on the hot forming process, it is our opinion that the hot forming to compress and reduce the end of the forging does not significantly impact the metallurgical character of the forging and result in a substantial transformation.

2. Use

Regarding a change in use, the imported articles are intended for a particular use, namely as elbow fittings or tees, and, in fact, are only intended to be connected to certain pipe sizes (except for those that are hot formed). While the court in *Midwood* heard testimony that the imported articles could not be used for any purpose in their imported state, the same would hold true for numerous articles, including the imported hand tool components in *National Hand Tool*, or the wire rod in *Superior Wire*. In *Superior Wire*, the court found that the end use of wire rod is generally known before the rolling stage and the specifications are frequently determined by reference to the end product for which the drawn wire will be used. 867 F.2d 1414. The court found that wire rod has few uses except for making wire, and hence, no substantial transformation was found. *National Hand Tool* did state that a predetermined use would not necessarily preclude the finding of a substantial transformation, but the court cited *Torrington Co. v. United States*, 596 F. Supp. 1083

(1984); *aff'd*, 764 F. 2d 1563 (1985), which was a more liberal interpretation of the regulations under the Generalized System of Preferences (GSP).[1]

In regard to the fittings, we do not find a change in name, character and use. It is our opinion that any changes to the metallurgical characteristics and shape of the forgings is minimal. The articles, whether compressed or reduced on one end, are still referred to as "elbows" or "tees" and their use to connect pipe is not changed. Therefore, it is our opinion that the importer/U.S. processor is not the ultimate purchaser. Accordingly, we find that the elbows and tees processed from imported foreign forgings, as described above, will be required to be marked with the country of origin of the forgings.

Holding:

Based upon the information provided, Customs finds that no substantial transformation results from the U.S. processing of the imported forgings to produce the finished pipe fittings. Accordingly, fittings processed from imported foreign forgings, as described above, will be required to be marked with the country of origin of the imported forgings. Consistent with this ruling, we propose to modify HRL 728693 dated November 5, 1985.

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT I]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
Washington, DC.

MAR–2–05 RR:CR:SM 561929 MLR
Category: Marking

TRINITY INDUSTRIES
2525 Stemmons Freeway
Dallas, TX 75207

Re: Country of origin marking of socket weld and threaded pipe fittings; substantial transformation; *Midwood;* Modification of HRL 730416.

DEAR SIR OR MADAM:

This is in reference to Headquarters Ruling Letter 730416 dated May 11, 1987, which was issued to you regarding the country of origin marking of certain forgings to be imported and processed into socket weld and threaded pipe fittings.

We have reviewed HRL 730416 and believe that the portion pertaining to whether a substantial transformation results from the U.S. processing of the imported forgings is incorrect. It is this aspect of the ruling that we are proposing to modify for the reasons set forth below. The portion of the ruling relating to the applicability of the marking requirements for certain pipes and pipe fittings under 19 U.S.C. 1304(c) would remain in effect.

Facts:

The imported items are solid forgings used in the production of socket weld and threaded pipe fittings. They are subject to the mandatory marking provisions of 19 U.S.C. 1304(c). In the U.S., the imported forgings are subjected to processing which includes machining, drilling the waterways, and either threading or machining for socket welding. You asked whether these machining and finishing operations performed in the U.S. result in a substantial transformation, and if so, whether the country of origin marking need not survive, or be replaced after, such processing.

In HRL 730416, Customs determined that the above-described machining and finishing operations constitute a substantial transformation of the forgings into finished socket weld and threaded pipe fittings. Accordingly, the U.S. processor was determined to be the ultimate purchaser of the imported forgings.

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[1] The court in *Torrington* indicated it was "keeping in mind the GSP's fundamental purpose of fostering industrialization" in making a substantial transformation decision. 764 F.2d at 1571; *see also Superior Wire*, 669 F. Supp. at 477.

Issue:

What are the country of origin marking requirements applicable to the finished socket weld and threaded pipe fittings?

Law and Analysis:

The marking statute, section 304, Tariff Act of 1930, as amended (19 U.S.C. 1304), provides that, unless excepted, every article of foreign origin (or its container) imported into the U.S. shall be marked in a conspicuous place as legibly, indelibly and permanently as the nature of the article (or its container) will permit, in such a manner as to indicate to the ultimate purchaser in the U.S. the English name of the country of origin of the article.

Part 134, Customs Regulations (19 CFR Part 134) implements the country of origin marking requirements and exceptions of 19 U.S.C. 1304. In order for the country of origin of imported articles to be considered the U.S., and excepted from marking, the work or material added to the articles in the U.S. must effect a substantial transformation. 19 CFR 134.1(b).

For country of origin marking purposes, a substantial transformation of an imported article occurs when it is used in the U.S. in manufacture, which results in an article having a name, character, or use differing from that of the imported article. In such circumstances, the manufacturer or processor in the U.S. who converts or combines the imported article into the different article will be considered the "ultimate purchaser" of the imported article, and the article is excepted from marking and only the outermost container is required to be marked. *See* 19 CFR 134.1.

In *Midwood Industries, Inc. v. United States*, 64 Cust. Ct. 499, 313 F. Supp. 951 (1970), welding fittings were imported and excess material was trimmed away from the ends, the ends were bored, tapered and beveled, die lines and other surface imperfections were removed, and the fittings were cleaned for the removal of oxidation and mill scale from the outer surface. The court heard evidence that the various processes to which the imported fittings were subjected, allowed them to conform to the standards reflected in specifications established by the ASA. The materials in the imported forgings conformed to standards established by the ASTM.

The court noted that the imported forgings were made as close as possible to the dimensions of the ultimate finished form. The court heard testimony that the forgings had no connecting ends allowing them to connect pipes together, and that they were often sold to machine shops. The court stated that the products remained forgings unless and until converted by some manufacturer from producers' goods into consumers' goods, that is, flanges and fittings. The court stated that the imported forgings, and the fittings and flanges made therefrom were different articles of commerce in a tariff sense. As the processes were manufacturing processes, albeit processes that were representative of a successive stage of manufacture, the court held that the importer/processor was the ultimate purchaser of the forgings.

The question to be resolved is whether *Midwood* is still applicable to the facts presented. The issue of substantial transformation in this case must be decided in accordance with the facts presented applying the reasoning employed by the court in a number of decisions in this area, namely whether a change in name, character, and use has occurred. *See Uniroyal Inc. v. United States*, 542 F. Supp. 1026 (CIT 1982), *aff'd*, 702 F.2d 1022 (Fed. Cir. 1983), *National Hand Tool v. United States*, 16 CIT 308, (1992), *aff'd*, 989 F.2d 1201 (Fed. Cir. 1993); *Superior Wire v. United States*, 669 F. Supp. 472 (CIT 1987); *aff'd*, 867 F.2d 1409 (Fed. Cir. 1989); *National Juice Products Ass'n v. United States*, 628 F. Supp. 978 (CIT 1986); *Ferrostaal Metals Corp. v. United States*, 664 F. Supp. 535 (CIT 1987).

In *Superior Wire*, the court stated that it was focusing on past precedent and primarily on those cases involving processing of metal objects without combination or assembly operations, noting that cases dealing with substantial transformations are very product specific. 669 F. Supp. at 479. Accordingly, a similar analysis of court decisions would seem to be appropriate with regard to this case.

1. Name

With respect to a change in name, we note in this case that the imported articles are variously referred to as "solid forgings." This is also confirmed in *Midwood*, where the imported articles were referred to as "unfinished flange forgings," "unfinished 180 degree elbow," "flange in the rough," or as "semi-finished articles." Subsequent to the *Midwood* decision, numerous decisions have determined that a change in name by itself is the least persuasive factor and is insufficient by itself to support a holding that there is a substan-

tial transformation. *See Superior Wire v. United States*, 867 F.2d 1409, 1414 ("this is the least persuasive factor and is insufficient by itself to support a holding that there is a substantial transformation"); *United States v. International Paint Co.*, 35 C.C.P.A. 87, 93–94 (1948) ("a change of name alone would not necessarily result in a product being regarded as 'manufactured or produced'"); *National Juice Products Ass'n*, 628 F. Supp. at 989 ("in applying the 'name, character or use' test, courts have focused primarily on changes in use or character of the item, turning to various subsidiary tests depending on the situation"). Accordingly, the evidence of any change in name is equivocal absent further evidence regarding character and use changes.

2. Character

With respect to a change in character, we note that the imported articles start as a solid metal formed into the overall shape of the finished socket weld or threaded pipe fitting. The imported articles are then subjected to drilling to create the waterways and then either threading or machining for socket weld connections. It is clear from the imported article that it possesses the overall outside and shape and characteristics of the finished article.

Subsequent to *Midwood*, the court in *Superior Wire* noted that the composition of the wire rod determines what uses the wire may have, and, therefore, no substantial transformation was found. 669 F. Supp.472. The metallurgical characteristics of strength and ductility and the processes that give the article those characteristics, annealing and galvanizing, were deemed to be important in *Ferrostaal* as significantly affecting the character of the steel by dedicating it to uses compatible with its strength and ductility. 664 F. Supp. at 5640. In *National Hand Tool*, the components were subjected to heat treatment which changed the microstructure of the material, but the fact that there was no change in the chemical composition of the material appears to have been relevant in finding no substantial transformation.

In *Midwood*, the court found that the "manufacturing" processes resulted in a substantial transformation, "[a]lbeit * * * representative of a successive stage of manufacture." 313 F. Supp. 957. Subsequent to *Midwood*, however, in *Superior Wire*, the court found no substantial transformation, in part because the "wire rod and wire may be viewed as different stages of the same product." 669 F. Supp. at 479. Accordingly, in light of the court decisions concerning metal articles subsequent to *Midwood*, under these particular circumstances with respect to the physical and chemical properties of the forgings, it is our opinion that the character of the forgings is not changed by the machining operations. The metallurgical characteristics are primarily dictated by the alloy used. The size of the pipe to which the fitting can be connected is dictated by the size of the forging.

3. Use

Regarding a change in use, the imported articles are intended for a particular use, namely as socket weld and threaded pipe fittings, and, in fact, are only intended to be connected to certain pipe sizes. While the court in *Midwood* heard testimony that the imported articles could not be used for any purpose in their imported state, the same would hold true for numerous articles, including the imported hand tool components in *National Hand Tool*, or the wire rod in *Superior Wire*. In *Superior Wire*, the court found that the end use of wire rod is generally known before the rolling stage and the specifications are frequently determined by reference to the end product for which the drawn wire will be used. 867 F.2d 1414. The court found that wire rod has few uses except for making wire, and hence, no substantial transformation was found. *National Hand Tool* did state that a predetermined use would not necessarily preclude the finding of a substantial transformation, but the court cited *Torrington Co. v. United States*, 596 F. Supp. 1083 (1984); *aff'd*, 764 F. 2d 1563 (1985), which was a more liberal interpretation of the regulations under the Generalized System of Preferences (GSP).[1]

Since we do not find a change in name, character and use, it is our opinion that the importer/U.S. processor is not the ultimate purchaser. Therefore, we find that the socket weld and threaded pipe fittings processed from imported foreign forgings, as described above, will be required to be marked with the country of origin of the forgings.

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[1] The court in *Torrington* indicated it was "keeping in mind the GSP's fundamental purpose of fostering industrialization" in making a substantial transformation decision. 764 F.2d at 1571; *see also Superior Wire*, 669 F. Supp. at 477.

Holding:

Based upon the information provided, Customs finds that no substantial transformation results from the U.S. processing of the imported forgings to produce the finished pipe fittings. Accordingly, pipe fittings processed from imported foreign forgings, as described above, will be required to be marked with the country of origin of the imported forgings. Consistent with this ruling, we propose to modify HRL 730416 dated May 11, 1987.

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT J]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
Washington, DC.

MAR 2–05 RR:CR:SM 561931 MLR
Category: Marking

MR. PATRICK H. GRAY
GENERAL MANAGER
UNI-FLANGE
5285 Ramona Blvd.
Jacksonville, FL 32205

Re: Country of origin marking; cast iron flanges and fittings; machining; drilling; grinding; assembly; pipe fitting; substantial transformation; Modification of HRL 734673.

DEAR MR. GRAY:

This is in reference to Headquarters Ruling Letter (HRL) 734673 dated December 17, 1992, which was issued to you regarding the country of origin marking requirements applicable to imported foreign castings which are processed in the U.S. into ductile iron adapter flanges.

We have reviewed HRL 734673 and believe that the portion pertaining to whether a substantial transformation results from the U.S. processing of the imported castings is incorrect. It is this aspect of the ruling that we are proposing to modify for the reasons set forth below. The portion of the ruling relating to the applicability of the marking requirements for certain pipe fittings under 19 U.S.C. 1304(c) would remain in effect.

Facts:

Two types of ductile iron adapter flanges are at issue, described on a commercial invoice as "Series 900, 1300 or 1350" flanges, and "Series 200, 400, or 420" flanges.

Series 900, 1300 or 1350

Two rough castings are imported for each complete unit. Each casting is placed on a special grinding fixture and the mating surfaces are ground smooth. The castings then move to a three part drilling station, where three bolt holes are drilled in each casting. After this drilling, domestic galvanized fasteners are placed in the bolt holes, joining the two halves together. The assembled unit then goes to the cutting lathe, where two machining functions are performed.

First, a machine cut is performed to bring the inside surface to a totally smooth, cylindrical shape. Next, a special serrating tool is inserted into the lathe and the unit receives a series of machine serrations, to exacting standards, on its inside surface. After 100% gauging, the unit is epoxy coated. Additional connecting hardware (domestic) is added.

Series 200, 400, or 420

A rough, one piece ductile iron casting is imported. This imported casting is placed on a lathe and the outside surface (rim) is machined smooth, followed by the face of the casting. Set screw holes are then drilled and tapped around the perimeter of the casting. Depend-

ing on the size, the number of set screw holes can range from 2 to 48. The casting is then placed on a special drilling fixture/template. Domestic set screws are then installed and the casting is epoxy coated.

It is contended that the above-described products are excepted from country of origin marking by virtue of the machining, fabrication, finishing, and assembly functions that are performed on each item; however, all containers will be marked.

Issue:

What are the country of origin marking requirements applicable to the finished ductile iron adapter flanges?

Law and Analysis:

Section 304 of the Tariff Act of 1930, as amended (19 U.S.C. 1304), provides that, unless excepted, every article of foreign origin entering the U.S. shall be marked in a conspicuous manner as legibly, indelibly, and permanently as the nature of the article (or container) will permit, in such a manner as to indicate to the ultimate purchaser in the U.S. the English name of the country of origin of the article.

Part 134, Customs Regulations (19 CFR Part 134), implements the country of origin marking requirements and exceptions of 19 U.S.C. 1304. Section 134.1(d), Customs Regulations, defines "ultimate purchaser" as generally the last person in the U.S. who will receive the article in the form in which it was imported. Section 134.35(a), Customs Regulations, provides that an article used in the U.S. in manufacture which results in an article having a name, character or use differing from that of the imported article will be within the principle of the case of *United States v. Gibson-Thomsen Co., Inc.*, 27 C.C.P.A. 267 (C.A.D. 98)(1940). Under these circumstances, the manufacturer who converts or combines the imported article into the different article will be considered the ultimate purchaser of the imported article, and the article shall be excepted from country of origin marking, although its outermost container must be marked.

In *Midwood Industries, Inc. v. United States*, 64 Cust. Ct. 499, 313 F. Supp. 951 (1970), imported flange forgings, conforming to ASTM standards, were subjected to several processes by the U.S. importer/processor. Excess material was removed from the rim, the forgings were faced, bored, threaded or beveled, and drilled and spotfaced. In certain instances, the flanges were subject to both heating and reducing one end in size and diameter by compression. In accordance with American Standards Association (ASA), the flanges were marked with the manufacturer's trade name, grade of steel, and wall thickness or pressure rating and size. In some instances, the flanges were subjected to chemical baths that cleaned and coated them with a phosphate solution. Sometimes, a final heat treatment and a rustproof coating was performed, or the flanges were painted or subjected to strictly cosmetic operations.

The court noted that the imported forgings were made as close to the dimensions of the ultimate finished form as possible. The court heard testimony that the forgings had no connecting ends allowing them to connect pipes together, and that they were often sold to machine shops. The court stated that the products remained forgings unless and until converted by some manufacturer from producers' goods into consumers' goods, that is, flanges and fittings. The court stated that the imported forgings, and the fittings and flanges made therefrom were different articles of commerce in a tariff sense. As the processes were manufacturing processes, albeit processes that were representative of a successive stage of manufacture, the court held that the importer/processor was the ultimate purchaser of the forgings.

The question to be resolved is whether *Midwood* is still applicable to the facts presented. The issue of substantial transformation in this case must be decided in accordance with the facts presented applying the reasoning employed by the court in a number of decisions in this area, namely whether a change in name, character, and use has occurred. *See Uniroyal Inc. v. United States*, 542 F. Supp. 1026 (CIT 1982), *aff'd*, 702 F.2d 1022 (Fed. Cir. 1983), *National Hand Tool v. United States*, 16 CIT 308, (1992), *aff'd*, 989 F.2d 1201 (Fed. Cir. 1993); *Superior Wire v. United States*, 669 F. Supp. 472 (CIT 1987); *aff'd*, 867 F.2d 1409 (Fed. Cir. 1989); *National Juice Products Ass'n v. United States*, 628 F. Supp. 978 (CIT 1986); *Ferrostaal Metals Corp. v. United States*, 664 F. Supp. 535 (CIT 1987).

In *Superior Wire*, the court stated that it was focusing on past precedent and primarily on those cases involving processing of metal objects without combination or assembly operations, noting that cases dealing with substantial transformations are very product spe-

cific. 669 F. Supp. at 479. Accordingly, a similar analysis of court decisions would seem to be appropriate with regard to this case.

In HRL 734673, Customs found that the machining operations that were performed on the articles described as the "Series 900, 1300 or 1350" are similar to those involved in *Midwood*, and determined that the U.S. processing constituted a substantial transformation. Thus, it was determined that the U.S. manufacturer was the ultimate purchaser of the imported castings. HRL 734673 made no decision regarding whether the processing performed to create the flanges described as the "Series 200, 400, or 420" resulted in a substantial transformation as there was insufficient descriptive information concerning the U.S. processing.

1. Name

With respect to a change in name, we note in this case that the imported articles are variously referred to as "castings" while the finished articles are referred to as "flanges." This is also confirmed in *Midwood*, where the imported articles were referred to as "unfinished flange forgings," "unfinished 180 degree elbow," "flange in the rough," or as "semi-finished articles." Subsequent to the *Midwood* decision, numerous decisions have determined that a change in name by itself is the least persuasive factor and is insufficient by itself to support a holding that there is a substantial transformation. *See Superior Wire v. United States*, 867 F.2d 1409, 1414 ("this is the least persuasive factor and is insufficient by itself to support a holding that there is a substantial transformation"); *United States v. International Paint Co.*, 35 C.C.P.A. 87, 93–94 (1948) ("a change of name alone would not necessarily result in a product being regarded as 'manufactured or produced'"); *National Juice Products Ass'n*, 628 F. Supp. at 989 ("in applying the 'name, character or use' test, courts have focused primarily on changes in use or character of the item, turning to various subsidiary tests depending on the situation"). Accordingly, the evidence of any change in name is equivocal absent further evidence regarding character and use changes.

2. Character

With respect to a change in character, we note that the imported articles are in dimensions that are close to their finished form. These factual conclusions are in accord with the facts as adduced by the court in *Midwood*. The materials used in the imported forgings also dictate the final characteristics to which the finished flanges may perform. This is similar to *Midwood* where it was noted that the forging conformed to the standards established by the ASTM. In this case, ductile iron castings are imported. Ductile iron, also known as nodular iron, has the ductility of malleable iron, the corrosion resistance of alloy cast iron and tensile strength greater than gray cast iron. It can be arc welded, provided adequate preheat and post-weld heat treatments are used in order to maintain the original properties. http://home.netcom.com/~ dwelding/castiron.htm.

Subsequent to *Midwood*, the court in *Superior Wire* noted that the composition of the wire rod determines what uses the wire may have, and, therefore, no substantial transformation was found. 669 F. Supp.472. The metallurgical characteristics of strength and ductility and the processes that give the article those characteristics, annealing and galvanizing, were deemed to be important in *Ferrostaal* as significantly affecting the character of the steel by dedicating it to uses compatible with its strength and ductility. 664 F. Supp. at 5640. In *National Hand Tool*, the components were subjected to heat treatment which changed the microstructure of the material, but the fact that there was no change in the chemical composition of the material appears to have been relevant in finding no substantial transformation. Here, it appears that the metallurgical characteristics are imparted during the casting process.

In *Midwood*, the court found that the "manufacturing" processes resulted in a substantial transformation, "[a]lbeit * * * representative of a successive stage of manufacture." 313 F. Supp. 957. Subsequent to *Midwood*, however, in *Superior Wire*, the court found no substantial transformation, in part because the "wire rod and wire may be viewed as different stages of the same product." 669 F. Supp. at 479. Accordingly, in light of the court decisions concerning metal articles subsequent to *Midwood*, under these particular circumstances with respect to the physical and chemical properties of the forgings, it is our opinion that the character of the forgings is not changed by the machining operations. The metallurgical characteristics are primarily dictated by the ductile cast iron. The size of the castings also dictates the sizes of pipe for which the fittings may be used. One aspect of the flanges which is imparted by the machining, the creation of serrations to close tolerances, does provide a mechanism to provide restraint onto the pipe and do so without damaging

the pipe. However, this only appears to be a change in a characteristic of the finished adapter flange. *See* National Hand Tool (although the heating process changes the microstructure of the material which may amount to changes in the characteristics of the material, there is no change in character.) Moreover, we note that joining the components together, both essential pieces of which are foreign, is not extensive.

3. Use

Regarding a change in use, the imported articles are intended for a particular use, namely as adapter flanges, and, in fact, are only intended to be connected to certain pipe sizes. While the court in *Midwood* heard testimony that the imported articles could not be used for any purpose in their imported state, the same would hold true for numerous articles, including the imported hand tool components in *National Hand Tool*, or the wire rod in *Superior Wire*. In *Superior Wire*, the court found that the end use of wire rod is generally known before the rolling stage and the specifications are frequently determined by reference to the end product for which the drawn wire will be used. 867 F.2d 1414. The court found that wire rod has few uses except for making wire, and hence, no substantial transformation was found. *National Hand Tool* did state that a predetermined use would not necessarily preclude the finding of a substantial transformation, but the court cited *Torrington Co. v. United States*, 596 F. Supp. 1083 (1984); *aff'd*, 764 F. 2d 1563 (1985), which was a more liberal interpretation of the regulations under the Generalized System of Preferences (GSP).[1]

Since we do not find a change in name, character and use, it is our opinion that the importer/U.S. processor is not the ultimate purchaser. Therefore, we find that the ductile iron adapter flanges described as "Series 900, 1300 or 1350" processed from imported foreign castings, as described above, will be required to be marked with the country of origin of the castings.

Holding:

Based upon the information provided, Customs finds that no substantial transformation results from the U.S. processing of imported castings to create ductile iron adapter flange series 900, 1300, or 1340. Therefore, the ultimate purchaser is the recipient of the completed steel flanges. Accordingly, the subject flanges processed from imported foreign castings, as described above, will be required to be marked with the country of origin of the imported castings. Consistent with this ruling, we propose to modify HRL 734673 dated December 17, 1992.

JOHN DURANT,
Director,
Commercial Rulings Division.

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[1] The court in *Torrington* indicated it was "keeping in mind the GSP's fundamental purpose of fostering industrialization" in making a substantial transformation decision. 764 F.2d at 1571; *see also Superior Wire*, 669 F. Supp. at 477.

REVISED NOTICE:
DEADLINE EXTENDED TO NOVEMBER 30, 2001

Pursuant to 28 U.S.C. § 2071(b), notice is given of certain proposed amendments to the Rules of the United States Court of International Trade. The proposed amendments were recommended by the Court's Advisory Committee, which was appointed pursuant to 28 U.S.C. § 2077(b). The proposals pertain to: USCIT Rules *3, 4, 5, 7, 8, 10, 11, 12, 16, 17, 21, 25, 26, 30, 37, 38, 41, 42, 51, 57, 58, 59, 60, 65, 65.1, 67, 69, 77, 81, 82* and new Rule *82.1;* USCIT Forms *7, 8, 13*, new forms *7A* and *8A*; Specific Instructions to USCIT Forms *2, 4, 7, 7A, 8, 8A*; and include a *draft Administrative Order with regard to electronic filing.*

This notice is given to provide the public, the bar and others interested in the work of the United States Court of International Trade with an opportunity to comment on the proposed amendments. All comments received will be forwarded to the Court for consideration.

Each proposal is accompanied by commentary describing the recommendation of the Court's Advisory Committee. Recommendations by the Advisory Committee for language to be deleted from each rule appears in brackets with strike-overs. New language proposed by the Advisory Committee is indicated in bold in a shaded background.

A copy of the amendments is available for review in the Court's Library, in the Records Management/Appeals Unit of the Case Management Section, and at the Court's web site: *www.uscit.gov*

Comments are to be submitted in writing the close of business on Friday, November 30, 2001 to:

Leo M. Gordon, Clerk of the Court
United States Court of International Trade
One Federal Plaza
New York, NY 10278–0001

Thank you for your interest in the work of the Court.

Dated: November 15, 2001.

LEO M. GORDON,
Clerk of the Court.

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